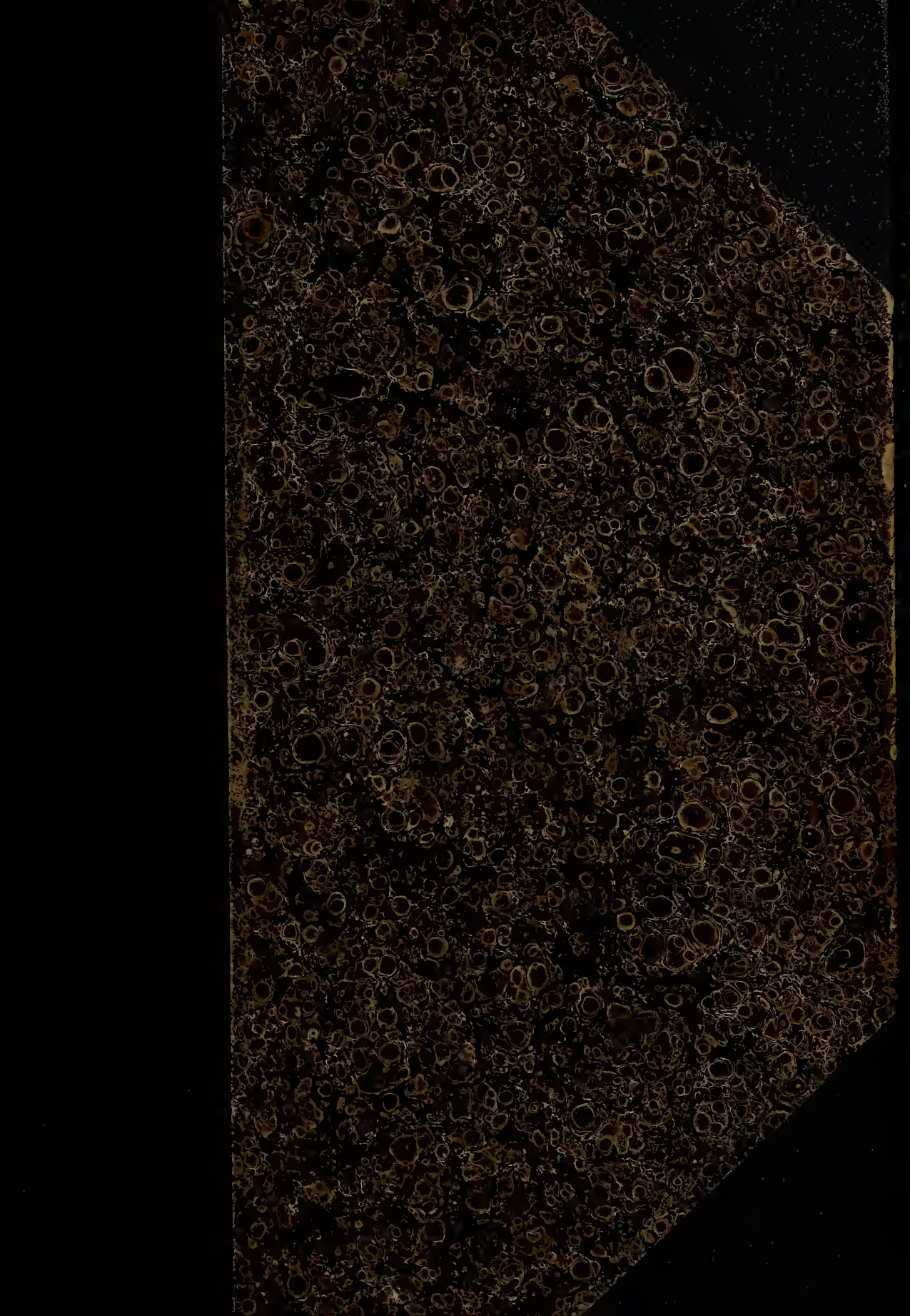

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MEDICO-LEGAL BULLETIN.

Vol. 3 No. 1

SPECIAL ARTICLES

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Contract. No.---------- ----------*Agent* **$20.00**

I hereby apply to the

Physicians Defense Company

Fort Wayne, Indiana

For a Defense Contract for *Medical and Surgical and Dental Services, and I understand and agree that said Contract shall be based upon the following statement of facts and agreements; and that the Company shall not be bound by statements made by any agent or broker not written or printed herein.

My full name is..... .....Office No.....St.

City of... .....County of.....State of.....

If connected with a firm, the style is.....

I graduated from the.....in the year.....

I practice under the.....School of Medicine; and have been duly Registered and Licensed to practice in this county, under the Laws of this State. Certificate No.....from the.....

I agree that this contract shall not cover suits for damages in which services were rendered while under the influence of liquors or drugs.

I agree to notify the Company at once by telegraph or telephone when demand is made, or suit commenced for damages, and will not make nor contract any expense without the written authorization of the Company, and will contribute my own time and assistance in defense of the case without charge to the Company.

I warrant each and all of the statements made herein to be true and complete. I also warrant that this application has been made and written by myself or duly authorized agent and that I understand its provisions

Date.....190... (Applicant's Signature).....

* Cross out professions not **practiced.**

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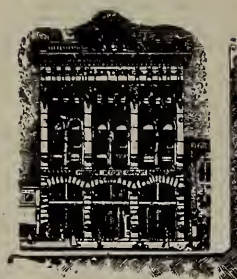

The Physicians Defense Company

FORT WAYNE, INDIANA

Long Distance Telephones: BELL, 43. HOME, 1338.

In Consideration of the written and printed application, which is hereby made a part of this contract, and the sum of Twenty Dollars, receipt of which is hereby acknowledged, being the consideration of one year's defense, and the further payment of Twenty Dollars annually in advance on the _____ day of _____ of each year during the life of this contract,

The Physicians Defense Company
(HEREINAFTER KNOWN AS COMPANY)

hereby agrees to defend the legally qualified Physician,

_____ of the City of _____, County of _____, State of _____ against all civil suits for damages for malpractice, based on professional services rendered by himself or his agent during the term of this contract, at its own expense, not exceeding FIVE THOUSAND DOLLARS in defense of any one suit, nor exceeding in the aggregate TEN THOUSAND DOLLARS in defense of suits based on services rendered by the holder hereof, within one year from the date of this contract, or within any one year for which this contract shall be renewed, all in the manner and upon the conditions herein below stated, to-wit:—

Immediate notice by telegram, must be given the company at the Home Office at Fort Wayne, Ind., of any suit brought or demand made, and the holder hereof shall immediately forward the summons, or other process served, and the complaint or petition filed, together with a full and complete history of the case and services rendered.

Upon receipt of notice from the holder hereof that a suit has been commenced against him for damages for civil malpractice, the company will employ a local attorney in whose selection the holder hereof shall have a voice, who, together with the company's attorney, will defend the case without expense to the holder hereof.

Such defense will be maintained until final judgment shall have been obtained in favor of the holder hereof, or until all remedies by appeal, writ of error or other legal proceedings shall have been exhausted, or until the sum of Five Thousand Dollars shall have been expended in said defense; provided said company shall not be under obligation to expend more than Ten Thousand Dollars in the aggregate in the defense of suits based on services rendered, by the holder hereof, during the original one year term or any renewed one year term of this contract.

Said company does not obligate itself to pay or to assume or to secure the payment of any judgment rendered against the holder hereof in any suit defended by it.

The company shall not compromise any suit or claim for malpractice against the holder hereof. Nor shall the holder hereof, after the company has entered upon the defense of any such suit in behalf of the contract holder, compromise the same without the consent of the company in writing first thereto had, and by reimbursement of the company its expenses theretofore incurred.

No suit or claim will be defended by this company, under this contract, in which the cause of action arose previous to the date of this contract.

This contract does not cover criminal prosecutions nor suits for assault, criminal abortion, foeticide, homicide or other criminal act, or actions arising by way of counter-claim or recoupment.

The company may cancel at any time the unexpired portion of this contract upon written notice mailed to the holder hereof, and the unearned portion of the consideration therefor, shall be returned to the holder hereof.

This contract does not take effect until the consideration therefor shall have actually been paid to the company or its authorized agent, but if the holder shall have paid such consideration and shall have received from the company or its duly authorized agent a memorandum certifying such payment and that the contract is to be subsequently delivered, then this contract shall be dated as of the date of such payment and shall be in force and effect from that date.

This contract shall not lapse at the end of the time as stated above if the holder hereof shall pay the annual consideration in advance at the Home Office in Fort Wayne, Ind., or to an authorized agent of the company, in exchange for the company's receipt, signed by the president and secretary and countersigned by the agent, but shall continue in force for the term or terms for which such annual consideration shall be paid; provided, however, that the liability of the company under such extension shall not be cumulative.

No consideration or agreement contained in this contract, or application for same, can be waived or altered in any manner by any person, other than the president or secretary, in writing endorsed hereon.

In Witness Whereof, The Physicians Defense Company has caused this contract to be signed by its president and secretary and its official seal attached hereto in Fort Wayne, Indiana, this _____ day of _____ 190__.

Miles H. Porter
President.

_____
Secretary.

Medico-Legal Bulletin.

ORIGINAL ARTICLES

SOME PHASES OF LEGAL MEDICINE.

(Concluded.)

Compensation.—At the common law and before the passage of the so-called Medical Act of England a physician could not, as a general rule, recover for his professional services in attending or prescribing for a patient. This rule apparently was founded upon the general custom of the profession then obtaining not to charge for professional services. The physician was presumed to practice in the expectation of an honorarium instead of for remuneration. This denial of the right to recover compensation not only extended to the physician regularly admitted to practice, but to every one holding himself out as a physician, though not fully admitted. At the common law if a physician acted in any other capacity than as a physician he could maintain an action to recover for his services provided he could prove that such services were not rendered by him as a physician. The physician could, however, enter into a special agreement for the payment of his fees, and when he had made such an agreement he was entitled to recover thereon even at the common law. Strange as it may seem, this prohibition at the common law against the recovery of compensation by a physician did not extend to surgeons and apothecaries, for they were allowed to bring and maintain actions to recover for services, attendance and medicines.

In the United States, happily shall I say, the rule prohibiting the recovery of compensation by a physician has never obtained, and from a very early date it has been uniformly held that a physician may recover for services rendered by him. The employment of a physician without express agreement as to his compensation raises an implied agreement on the part of the employer to pay for the services the reasonable worth and

value thereof. In this country the physician may enter into a contract with his patient whereby his right to compensation will be made dependent upon his curing the patient entirely, or within a stipulated time, and the failure on his part to comply with the condition will prevent a recovery for services. As you all know, it is not essential to the validity of the contract that a specified or certain compensation should be agreed upon, nor is the nature of the disease material, and in an action by a physician to recover the reasonable value of his services our courts hold that it is competent for the defendant to prove the real value of such services, or that they were of no value, or that the medicines were worthless. To illustrate: The physician, to maintain an action against a person to recover for professional services rendered a third person, must show a promise by the defendant, either express or implied, to pay therefor. The consent of the patient is not necessary to the validity of an express contract on the part of a third person to be answerable for a physician's compensation. Again, the liability of such third person is not affected by the fact that it was not assumed until after the physician had made several visits to the patient without the knowledge or procurement of such third person, for the courts hold that this liability is in the nature of an original undertaking on his part. When a person requests a physician to perform services for a patient, the law does not raise an implied promise to pay the reasonable value of the services so rendered, unless the relation of the person making the request to the physician is such as to raise the legal obligation on his part to call in a physician and pay for his services. Whether or not such implied liability is created depends largely on the circumstances of each particular case. In this connection it is not necessary that I advise you that when a father summons a physician to attend his minor child the law implies on his part a contract to pay the reasonable value of such services because of the legal obligations existing between the child and the father. The father is also liable for medical attendance procured of a minor child by a servant under whose protection he places the child, even though the occasion or necessity for the services should arise through the negligence or carelessness of the servant. It is, however, held in law that a promise by the parent is not implied from the fact that he requested the physician to attend to a child who is sick at his house where the child is of full ago, but an implied liability is also created where the husband procures medical attendance for the wife. If a wife requests the services of a physician the legal presumption or-

dinarily is that she acts as her husband's agent, but if she in employing the physician charges her separate property with the debt she is liable. A wife cannot be held liable for services rendered her deceased husband where there is nothing to show that she employed the physician or suggested his attendance. Where a physician is summoned in consultation by another, he may recover compensation from the patient for his services, although there is an agreement between the attendant physician and the patient that the attendant physician shall be liable for the expenses of the consultation, unless the consulting physician expressly consents to the understanding.

While, as I say, the law presumes a promise to pay for the services of a physician, it is competent to show that the services were rendered gratuitiously. Whether the physician's services are to be deemed a gratuity or to be paid for is, in every case, to be determined by the common undrstanding of both parties. Where a physician seeks to recover the reasonable value of his professional services rendered another physician, evidence that it is not the custom to charge for attendance in such cases is admissible. Under the statutory provisions of some states charges for medical attendance and medicines during the deceased's last sickness are made a preferred claim in the distribution of the estate. An action by a physician on account of professional services is governed by the same limitations which apply to accounts generally. In the absence of a stipulation to the contrary, the statute commences to run when the service is performed. As to whether malpractice will defeat recovery in an action for compensation there is a conflict of authority. In some states it is held that the facts which will sustain an action against a physician for malpractice will defeat his right to recover for services. The better and more reasonable views is that the rules applicable to contracts generally should apply to that between physician and patient, and holds that no penalty beyond the damage arising from the malpractice is to be visited upon the physician and that the value of the physician's services may be set off against the damages caused by the malpractice. Where the defendant relies upon malpractice in the treatment of the case as a defense, the burden of proving such malpractice rests upon him. Of course where an express contract for services has been entered into by a physician, his right of compensation is limited to the amount agreed upon. Where the contract merely calls for performance of services of a certain nature, additional compensation may be recovered for services of a different nature which the physician may perform. Where the

services for which the contract was made are not in fact performed there can be no recovery on a note given in consideration therefor. In the absence of a special agreement for the amount of compensation, the law implies a promise to pay what the physician's services are reasonably worth, and in such an action the physician must prove the ordinary and reasonable price for services of such or the like nature. He is not obliged, however, to prove the value of the services to the defendant. If the physician fails to show the value of his services, only a nominal recovery can be had. The customary charge of physicians and surgeons in the same city, locality or neighborhood may be shown by the defendant. In determining what is a reasonable compensation for his services, the learning, experience and skill of a physician or surgeon and the nature and difficulty of the case may and should be fully considered. While the patient may by special directions, limit the number of visits of a physician or surgeon, in the absence of such directions, the physician or surgeon is the sole and proper judge of the necessary frequency of his visits, and so long as the patient is in his charge it will be presumed that the visits made were deemed necessary and proper. In determining the value of a physician's services, the pecuniary condition of a patient cannot be taken into consideration. Certainly not, unless there is a recognized custom or usage to graduate professional charges to the financial condition or worth of the patient. Remember that it is always for the jury to determine the value or reasonable worth of your professional services in case litigation results upon your charges.

In passing, perhaps I ought to call your attention to the law of this state in respect of compensation to expert witnesses. As you will remember, the fee of a witness for attending any action or proceeding pending in a court of record is $1.00 for each day, with mileage allowance at the rate of six cents per mile in going to and returning from the place of attendance, to be estimated from the residence of such witness if within this state, or, the boundary line of this state if the witness passes it in coming, if his residence is out of this state. As to expert fees, our statute is that the judge of any court of record in this state before whom any witness is summoned or sworn or examined, as an expert in any profession or calling, may in his discretion allow such fees or compensation as in his judgment may be just and reasonable. In short, the making of an allowance to experts is left under the law of this state to the sound discretion of the trial judge. This statute was designed to apply to cases where witnesses are called to testify to opinions founded upon

special study, skill or experience in any profession or calling, or to make a scientific or professional examination of matters connected with the causes and then state the results. Our court holds that this provision as to expert witnesses has reference to an allowance to be made after the witness has been summoned and dismissed without being sworn or examined, or after he has been sworn and examined, and not before. Our statute likewise provides that no person is obliged to attend as a witness unless the fees are paid or tendered to him, allowed by law for one day's attendance as a witness and for traveling to and returning from the place where he is required to attend. This provision undoubtedly applies to expert witnesses subpoenaed as well as all others, but clearly relates only to the fees and mileage allowable by statute to non-experts. Our Supreme court has held that a physician or surgeon, upon the stand as a witness, cannot properly refuse to answer a question on the ground that his answer will be expert evidence, and that he has not been summoned or paid as an expert witness. The rule in this state is that no witness can refuse to answer a question on the ground that his answer will be what is known as expert evidence, and this, whether he has been summoned or paid as an expert witness or not, and that the provisions of our statute which authorize a judge to allow an expert witness "such fees or compensation as may be just and reasonable," have reference only to an allowance to be made after the witness has been summoned and dismissed without being sworn and examined, or after he has been sworn and examined, and not before.

Malpractice.—This is a subject which must necessarily greatly interest every active practitioner of medicine or surgery, especially so when we take into account the infirmities of human flesh and the too evident desire of the many, at the expense of the few, to get something for nothing. It is needless for me to say that, in my opinion, the very great majority of malpractice cases are without merit and are unfounded in truth and in fact. But your profession must necessarily meet conditions as they exist. Doubtless there are those of your profession, as well as of every other, who in the very nature of things are unskillful and bunglers at the trade. I am quite willing to concede that this same situation confronts the members of my own profession as well as yours, and, too, I am not unmindful of the fact that patients and clients sometimes are on the make even at the expense of those who give their best services and make most heroic efforts to their aid and in their behalf. So, in the

practice of your profession and in the daily conduct of your responsible and arduous duties you must ever assume and be subject to the risk of being sometime, within the compass of your professional life, brought to face a charge of malpractice, rightly or unjustly founded, upon which vexations and expensive litigation may arise.

Malpractice in law is the bad professional treatment of disease, or bodily injury, from alleged reprehensible ignorance or carelessness or with criminal intent. A physician or surgeon, or other medical practitioner, offering his services to the public as such impliedly contracts that he possesses, practices and will use, in the treatment of his patient, a reasonable degree of skill and learning, and that he will exercise reasonable care and exert his best judgment to bring about or encompass a good and wholesome result. Understand, the legal obligation is that he possesses and will exercise, in the treatment of his patients, a reasonable, only a reasonable, degree of skill and learning, and will exercise reasonable, and only reasonable, care, as also his best judgment to bring about a good result. A failure to perform this legal obligation and contract renders him liable for injuries caused to his patient thereby. The legal standard by which the degree of care, skill and diligence which are ordinarily possesses by the average of the members of the profession in good standing in similar localities, regard also being had to the state and development of medical science at the time in question. A mere want of due care and skill gives no right of action where no injury results. Unless it is so provided by an express contract, the physician or surgeon in law does not warrant that he will restore his patient to the same condition in which he was before the necessity for treatment arose, or even that the result of the treatment will be successful. Understand, the skill and care of physicians or surgeons in the particular locality or neighborhood is not the standard, but, on the contrary, that ordinarily possessed by physicians or surgeons in good standing practicing in similar localities. Remember, always, that the physician or surgeon is not an insurer. In the absence of a special statute, the law does not give exclusive recognition to any particular school or system of medicine, and the question of whether or not a practitioner in his treatment of a case exercised the requisite degree of care, diligence and skill is always to be tested by the general rules and principles of the particular school of medicine in which he is trained or which he follows, not by those of other schools or methods. In order legally that a school of medicine may be entitled to

recognition under this rule it must have rules and principles of practice for the guidance of all its members in respect of principles, diagnosis and remedies which each member is supposed to observe in any given case. A class of practitioners without fixed principles or formulated rules for the treatment of disease must and will be held in law to the duty of treating patients with the ordinary skill, knowledge and diligence of physicians or surgeons who are in good standing. What in law is reasonable care, skill and diligence must necessarily depend largely upon the circumstances of the particular case and upon the duty to be performed and the degree thereof requisite must be in proportion to the nature and character of the case. The same degree of care, skill and diligence and the same measure of duty and responsibility must be given by the practitioner to the patient whom he may be treating gratuitously as to the one from whom or on account of whom he receives compensation. The same rule applies to one holding himself out as a specialist in the treatment of disease or injuries of a certain nature or character and he is held in law to the same degree of care, skill and knowledge ordinarily possessed by practitioners devoting special attention and study to the same subject or branch. One who renders aid to the sick, either as a volunteer or upon request as friend or neighbor, but without having or pretending to have special skill or qualification, incurs no professional responsibility. But, if an unskillful person professes to be a practitioner and holds himself out to be one, he is held liable for a failure to exercise the degree of care, skill and diligence legally required of practitioners. The liability of the physician or surgeon is not limited to injuries arising from improper or negligent treatment, but he is also liable where he fails through a want of the requisite degree of care, skill and diligence to detect or diagnose the nature of the patient's complaint or disability. It is incumbent upon the physician or surgeon to give such instructions as are proper and necessary to enable the patient or his nurses or attendants to act intelligently in the further treatment of the case, and a failure to do so is negligence which will render him liable for injury resulting therefrom. The physician or surgeon is under an implied obligation when he undertakes to treat disease or injuries to bring to his aid and assistance all such obtainable remedies and appliances as discovery, invention and experience have proved to be the most proper and beneficial in aiding recovery. Where the death or injury of a patient results from the negligence of a physician or surgeon in writing an erroneous pre-

scription, he is liable even though the druggist who compounds the prescription is also guilty of want of care or negligence, and though the prescription was taken to another druggist than the one to whom the physician or surgeon directed it. While it always lies with a physician or surgeon to elect whether or not he will undertake the treatment of a case, when he does undertake it he impliedly contracts, in the absence of an understanding to the contrary, that he will continue his attendance so long as treatment is required. This implied obligation can only be terminated legally by the cessation of the necessity which gave rise to the relation of patient and physician or surgeon, or by his discharge by the patient, or by his withdrawing from the case after giving the patient sufficient notice to enable him to secure the services of some one else. In determining whether or not the patient requires other or further attention, the physician or surgeon must exercise ordinary care and skill, having always in mind a regard to the well settled rules and principles of medical science.

In an action for malpractice for abandoning a case, the law provides that the burden of proving the discharge by the patient is upon the physician or surgeon. If the physician or surgeon informs a person presenting himself for treatment that his disease or injury in his judgment is curable, when he knows that it is incurable, or has no knowledge whether his representation is true or false, and he thereby induces such person to take a course of treatment, this fact it has been repeatedly held will in law render the physician or surgeon liable to an action for deceit and likewise will constitute a defense to his claim or action for professional fees. The rule seems well settled that if the practitioner is not competent, or feels that he is not competent, to treat a paricular case, it is his duty to recommend the employment of another, but if he is competent and so considers himself, and yet is in doubt concerning the case, it is his duty to use his best judgment as to consultation with another physician or surgeon. He is chargeable with knowledge of the probable consequence of an injury or of neglect or of unskillfulness in treatment, and he is also bound in law to know the natural or probable results of the remedies which he employs or the medicines which he uses. The patient's condition at the time the physician takes charge of the case does not prevent a recovery of damages caused by the physician's or surgeon's malpractice, even though such condition may be a contributing cause of the injury which results to the patient. But the rule is firmly established that in assessing the damages the

effects of the malpractice and those from independent causes must be distinguished. A physician or surgeon possessing the requisite qualifications and applying his skill and judgment with ordinary care and diligence to the diagnosis and treatment of the patient is not liable for an honest mistake or error in judgment, either in making the diagnosis or in prescribing the mode of treatment, in all cases in which there is ground for a reasonable doubt as to the practice which should be pursued. But one not possessing the requisite qualifications cannot claim to be exempt from liability on the ground that his mistake was caused by an error in judgment, and this exemption from liability for errors of judgment does not extend to such errors as are so gross and patent as to imply want of due care and skill. In order that the physician or surgeon may be relieved from liability on the ground that his course was pursued through an error of judgment, he must keep always within recognized and proved methods, and he cannot depart from the known rules and usages of the profession to attempt or undertake an experiment. It is held that a physician or surgeon by a special undertaking or agreement may render himself liable for injuries caused even by errors of judgment. A failure on the part of one of the members of a firm of physicians and surgeons to exercise the requisite degree of care, skill and diligence is in law a failure of each and all of the members of the firm and each and all are liable for injury resulting from the failure. In case the injury results from a wanton or willful act of one of the members, committed outside of the partnership business and not from negligence, the partnership is not liable, but the party doing the act is alone answerable. It would seem, however, that to render a firm liable for the act of one of its members the patient should have employed the professional services of the firm and not those of any individual member thereof. The mere fact that a physician or surgeon who is unwilling or unable to assume or continue the treatment of a case recommends or suggests another physician or surgeon who is not connected with him or in any sense in his employment does not render the former liable for injuries resulting from the want of skill, care or diligence on the part of the latter; but remember, that a physician or surgeon is liable, however, for malpractice on the part of anyone who is his agent, assistant or apprentice. After a physician or surgeon has been discharged by his patient, he is not liable for injuries resulting from subsequent treatment, and it has been frequently held that a physician or surgeon discharged by a patient cannot be held liable for an injury resulting from a failure

to take a step which properly should not have been taken until after the time at which he was discharged. But, if after his discharge or his employment otherwise ceases, the surgeon volunteers and offers advice which deceives or misleads the patient, he is responsible for injuries arising therefrom. An opinion expressed by one of the partners of a firm in the absence of the others, after the employment is at an end, as to the propriety of the treatment or as to the results secured does not render the absent partner or partners liable. A physician incurs no liability where the natural temperament or physical weakness of the patient of which he is ignorant contributes to bring about an injury which could not be foreseen as a legitimate result of the course of treatment, and where the character of the injury and condition of the patient are such that the proper and usual course of treatment cannot be pursued; failure to employ it does not show or establish want of skill or care on the part of the practitioner.

The general rule with regard to the effect of contributory negligence and the right to recover for personal injuries applies to actions for injuries arising from malpractice, and it is uniformly held that where negligence on the part of the patient proximately causes or contributes to his injury or to the result of his injury, there can be recovery on his part. The patient's negligence is, however, not a bar to a recovery if it does not cause or contribute proximately to the injury caused by the physician's or surgeon's malpractice. The law requires that the patient shall, and it is his duty to, conform to the reasonable and necessary prescriptions and treatment ordered by the physician or surgeon, and his failure which in any way contributes to the injury or an adverse result will bar a recovery on his part, even though such compliance on his part is prevented by the pressure of pain or on account of inconvenience. If the patient's condition is such that cannot be made to understand the necessity of the proposed treatment and the members of his family or his attendance having him in charge refuse to allow or enforce the proposed treatment, then, the physician or surgeon is not required to use force and relieved from liability for injuries or adverse results arising from the failure to apply the treatment. Again, the practitioner is not liable for injuries or adverse results arising from a course of treatment followed by him at the patient's request and against his own advice, nor is he liable where the injury or adverse result is caused or in any manner contributed to by the interference of the patient or those having him in charge while the physician or surgeon is

performing his duties. Even though no instructions are given the patient, he is required to exercise the ordinary prudence which would be expected of persons in his condition, and the failure on his part to exercise this prudence bars a recovery. If the patient refuses or neglects to procure immediate assistance requested by the practitioner, there can be no recovery from such injuries or adverse results as arise therefrom. When, however, liability for malpractice has been incurred, the subsequent negligence of the patient or of any other practitioner subsequently called in of such nature as to aggravate the injury, will not discharge the liability of the first physician, but merely goes to the extent of the mitigation of damages. The patient's failure to consult another physician is not contributory negligence unless he is fully aware that his injury has not been, and is not being, properly treated.

The right of action for malpractice accrues and the statute begins to run at the time the injury is received, not from the time the danger is developed. Not only is practitioner liable to the one injured by reason of his malpractice, but in the case of injuries or adverse results to married women, infants or servants, the physician or surgeon is exposed to an additional action by the husband, father or master for the loss of services. In all actions for malpractice the damages awardable are generally compensatory. The measure of damages is such reasonable sum as will compensate for the injury. Punitive damages or those by way of punishment are not perimssible. The rule as in all ordinary personal injury cases in compensation. In actions for malpractice the same rules as to the admission and relevancy of evidence and the measure of damages apply as in other actions for negligence. In an action for malpractice, evidence to show that the complaint from which the plaintiff was suffering ordinarily produces the injury for which recovery is sought is competent. You will remember that while it is competent to testify to the proper practice in such cases as pursued from study or established from experience, it is not admissible for the physician or surgeon to testify as to the results of the treatment in similar cases by him in his previous practice. Also, that the general reputation of a physician or surgeon for competency and skill is inadmissible in an action for malpractice, because the issue is his conduct in the particular case. If, however, his skill and his intelligence become a material issue, such evidence is admissible. Where the death of a person results from the criminal negligence of a practitioner in the treatment of the case, the latter is usually guilty of manslaughter. This

liability is not dependent on whether or not the one who undertakes the treatment of a case is a licensed practitioner or merely assumes to act as such, but attaches in both cases. Nor is it material in determining this criminal liability that the practitioner, or one assuming to act as such, acted with good intent in administering treatment and did so with the expectation and honest conviction that the result would prove beneficial. The real question upon which the criminal liability depends is whether there was criminal negligence. Criminal negligence is largely a matter of degree incapable apparently of precise definition, and whether or not it exists to such a degree as to involve criminal liability is to be determined by the jury. In general I may say that criminal negligence exists where the physician or surgeon or anyone assuming to act as such exhibits gross lack of competency, or gross inattention, or criminal indifference to the patient's safety. This may result from his gross ignorance of the science and practice of medicine or surgery, or of the effect of the remedies and methods employed, or through his gross negligence in the application and selection of remedies, or through his failure to give proper instructions to the patient as to the use of medicine. In general, where the practitioner treating the case does nothing which a skillful person might not do and death results merely from an error of judgment on his part, or an inadvertent mistake, the practitioner is not liable. It is well to remember that one unskilled in the art of medicine will not be held accountable for death resulting through his ignorance of the treatment of a case where he undertakes to treat the case in a sudden emergency and in the absence of professional aid, and also that the consent of a patient to an operation is not a good defense for an action for manslaughter unless the operation is performed with due care and skill. The mere fact that the original injury was caused by another does not relieve the practitioner guilty of malpractice from liability for death if the remedy which he employed was improper and dangerous, but if he applied the proper remedy the person originally causing the injury and not the practitioner is liable. In determining criminal liability for malpractice, it is immaterial whether the person administering the remedy prepares it himself or procures it from another, or whether he administers it, or merely recommends it, to the patient.

Under the law of Minnesota, if a physician or surgeon, being in a state of intoxication, without a design to effect death, administers any poison, drug or medicine, or does any other act as a physician or surgeon, to any other person which pro-

duces the latter's death, he is guilty of manslaughter in the second degree, and, if in a state of intoxication, he administers any poison, drug or medicine, or does any other act as physician or surgeon, to any other person by which the latter's life is endangeed or seriously affected, he is guilty of a misdemeanor. Of course, to suggest these provisions is an act of supererogation on my part, since in the theory of the law the members of your society never drink. At common law a right of action against a physician for malpractice died with the patient, but under our statutes an action for damages lies in favor of the legal representative for the benefit of the next of kin against the physician or surgeon for unskillful or neglectful operation or treatment. It has been held, however, that an action for damages for injuries to a person caused by malpractice of a physician or surgeon does not survive the death of the physician and cannot be maintained thereafter. Under the law of this state where death ensues the action for malpractice must be brought within two years after the date of such death, but in all other actions for malpractice where the patient does not die the claim is not barred until six years from and after the time when the injury was received. In an action for malpractice the burden of proving that the negligence of the plaintiff caused or contributed to the injury is on the defendant. The burden is on the plaintiff, however, to prove unskillful or careless treatment; in short, he must prove want of reasonable skill or care and that the injury resulted therefrom. If, in an action brought by a physician or surgeon to recover for professional services, the defendant sets up want of skill or care as a defense the burden is on the defendant to prove such want of skill or care. In an action against a physician or surgeon for malpractice, it being claimed that the injury complained of resulted from want of skill or neglect, it is competent for the physician or surgeon to show that he has received a good surgical and medical education and is a regularly educated and skillful surgeon or physician, and that such a physician or surgeon possesses such skill can be shown by the testimony of members of his profession who speak from personal knowledge of his practice. In malpractice cases for damages the issue is to be determined always by a preponderance of the evidence, and it is not necessary for th plaintiff to prove the charge by evidence sufficient to be a clear conviction in the minds of the jury. Remember, however, that malpractice will not be inferred, unless well proved, as the legal presumption is ever against it.

State Medicine.

Under this head will be published articles relative to the application of medical knowledge to the public welfare. It includes forensic medicine, public hygiene, medical ethics, medical education and military and naval medicine.

Communications, articles and reports from members of state boards of health and boards of registration and examination are requested.

MEDICAL LAW FOR INDIAN TERRITORY.

Shortly before adjournment Congress passed a law regulating the practice of medicine in Indian Territory. No one is allowed to practice without being registered in the office of the clerk of the United States court in the district. One desiring to practice must present his or her diploma to the board of examiners (appointed by the judges of the several districts) for the district. If the diploma is approved by the board, registry may be obtained without examination. No diploma issued after July 1, 1904, will be accepted, unless it has been granted by a college requiring a preliminary examination and a four-years' course of medical study. In the absence of a diploma or the possession of one not approved by the board an examination will be required.—The Medical Age.

SHE DESERVED THE PENSION.

Among the cases in the United States pension office, many of which have been pushed to a successful issue on less plausible testimony, is a claim for a widow's pension, in which the claimant declares that at one of the battles of the late war (1861-1865) she was a spectator. She happened to stand behind some soldiers, and was wounded in the abdomen by a ball that had previously wounded a soldier in the testicles, from which she became pregnant and was delivered of a boy. What purports to be corroboratory testimony bearing on the case is the allegation that the boy subsequently underwent lithotomy, when a conoidal musket ball was removed from the bladder.—Medical Jurisprudence, Witthouse & Becker.

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EDITORIAL

PHYSICIANS and surgeons, it is said, have as a first quality conscientiousness; this, of course, is gained from the peculiar experience of tribulations and achievements. The patient, however, is, as a rule, of different mold. He appreciates only success. If a physician uses his utmost skill and fails this patient sees no virtue in the services. Then the patient seeks what he presumes to call retaliation, and this brings the physician to DEFENSE. Every physician is open to this dissatisfaction, therefore every physician needs defense, and anything but defense is insufficient. The Physicians Defense Company are the exponents of a cause founded upon a purpose, and that purpose is a fighting cause. This Campany is equipped to fight, and is not afraid to apprise the "other fellow" of that fact. When physicians and surgeons have a reputation builded upon care, skill and learning, then they need, to protect that reputation, a fighting COMPANY.

Judicial Decisions.

Under this heading will be presented each month information relative to judicial decisions affecting the medical profession.

COMPULSORY VACCINATION OF SCHOOL CHILDREN.

The Supreme court commissioners of California say, in French vs. Davidson, that in the case of Abell vs. Clark, 84 Cal. 226, the title of the "Act to encourage and provide for a general vaccination in the state of California" was shown to be in substantial compliance with the requirements of the constitution, and many authorities. were cited illustrating its sufficiency The uniform operation of the act on a natural class of persons, to wit, school children, was asserted, and its compliance with the constitution in that behalf was declared. That the vaccination act came within the police power of the legislature of the state, and that it was for the public good, was clearly maintained by the opinion. It was also shown that the act in no way impaired any constitutional provision against special legislation. The soundness of that decision has never been questioned, so far as the commissioners have been able to ascertain. The case has been frequently cited, and the principle of it approved, both in California and in other states. The legislature, the commissioners go on to say, no doubt was of opinion that the proper place to commence in the attempt to prevent the spread of a contagion was among the young, where they were kept together in considerable numbers in the same room for long hours each day. It needs no argument to show that, when it comes to preventing the spread of contagious diseases, children attending school occupy a natural class by themselves, more liable to contagion, perhaps, than any other class that we can think of. This effort to prevent the spread of contagion in a direction where it might do the most good was for the benefit and protection of all the people, and there is in it no element of class legislation. It in no way interferes with the right of the child to attend school, provided the child complies with its provision. Police regulations generally interfere with the liberty of the citizen in one

sense, but it is no valid objection to a police regulation that it prevents a person from doing something that he wants to do, or that he might do if it were not for the regulation. When it has been determined that the act is within the police power of the state, nothing further need be said. The rest is to be left to the discretion of the lawmaking power. It is for that power to say whether vaccination shall be had as to all school children who have not been vaccinated all the time, or whether it shall be resorted to only when smallpox is more than ordinarily prevalent and dangerous. Nor does the fourteenth amendment or any other part of the federal constitution interfere with the power of the state to prescribe regulations to promote the health and general welfare of the people.—J. A. M. A.

WOMAN'S CHARGE TO PHYSICIAN AGAINST MAN NOT PRIVILEGED.

The First Appellate division of the Supreme court of New York says, in the case of People vs. Abrahams, where it was sought to fix the paternity of a child born on the 15th of May, that a practicing physician with whom the mother had a consultation in the preceding September or October was asked, "In that conversation, did she make any charge against any person as being the cause of her condition at that time?" This was objected to and the objection sustained. It was sought to sustain the ruling on the ground that the answer was not admissible under section 834 of the New York Code of Civil Procedure, which provides, "A person duly authorized to practice physic or surgery * * * shall not be allowed to disclose any information which he acquired * * * in a professional capacity and which was necessary to enable him to act in that capacity." The testimony here sought to be elicited was not information acquired by the physician which was necessary to enable him to act as such. It needs no argument to demonstrate such fact, and its exclusion may have done great injustice to the accused. He testified that he never met the mother until the 15th of October. The question called for a statement made by her in September or October, and if she stated to the physician at that time that some other person than the accused was the cause of her condition it was possible that the court would have reached a different conclusion than it did, adjudging the accused to be the father of the child. In any event, the testimony was admissible, and for the error committed in excluding it a new trial must be had.—J. A. M. A.

RIGHT OF PHYSICIAN TO ENTER PREMISES TO TREAT LODGER.

The Supreme court of Iowa says, in the case of Watson vs. Dilts, that it has no doubt that a boarder and lodger may have an implied license to have a physician enter on the premises in case of illness, so that if one went to the house for the sole purpose of treating such boarder and lodger in a strictly professional capacity he ought not to be held a trespasser. But an implied license to enter the premises of another contemplates an entry only in the usual way, and at a reasonable time.—J. A. M. A.

VALID PROVISION FOR CONTAGIOUS DISEASE HOSPITAL.

The Supreme Judicial court of Massachusetts holds constitutional, in the case of Manning vs. Bruce, a statute providing that the City of Everett, by its city council, may take any lands within the limits of the city for the erection of a hospital for the care of persons suffering from contagious diseases. It says that, while so far as the statute affects the owner of the property taken it is an act in exercise of the right of eminent domain, it is nevertheless, in the object ultimately to be reached, an act in the interest of the public health, and, so far as it confers the right to erect and maintain on the land taken a hospital for contagious diseases, it finds its sanction in the general police power, subject to the proper exercise of which all property is held. It was not necessary to discuss the right to deal with contagious diseases. Even the right of personal liberty must yield to the measure necessary for the protection of the general health. A man afflicted with smallpox or any other contagious disease dangerous to the public health has for the time being lost his personal freedom and may be compelled to yield to restraint, carried if necessary into compulsory isolation. Hospitals must be established and maintained for such persons, and for more than a century cities and towns have been authorized by statute

to do this, and, in case of the breaking out of a contagious disease dangerous to the public health, it is made the duty of the proper public officer to provide a hospital or place of reception. Such laws, being necessary for the protection of the public health, are wholesome and reasonable, within the meaning of the phrase as used in the constitution, and they violate no constitutional provision. Under the general law the city could have erected such a hospital, but it was limited to such land as it could buy, and no doubt this statute was passed not so much to grant it authority to build and maintain a hospital as to enable it to obtain, by the exercise of the right of eminent domain, a site for it. Such a hospital is under the supervision of the board of health, and it is not to be assumed in advance that it will be a nuisance, public or private.—J. A. M. A.

PHYSICIANS AND CERTAIN OPTICIANS NOT MERCHANTS.

The Supreme court of Iowa says, in City of Waukon vs. Fisk, that a surgeon specialist who treats deformities of the body by the use of straps and braces made according to his measurements would not be classed as a merchant simply because he habitually supplies his patients with the necessary apparatus by orders on the manufacturer, and receives or collects payment therefor. Neither would we so class a physician who receives a commission on prescriptions filled by a pharmacist. Likewise, it holds that a traveling optician who does not carry spectacles or eyeglasses for sale, but examines and tests the eyes of persons applying to him therefor, and writes the description of the glasses required on a "prescription blank," which is mailed to a dealer, in Chicago, who fills the order by grinding and preparing the glasses according to the directions, and sends them direct to the customer, is not a merchant, and can not be subjected to a license tax as one, by a city authorized to define by ordinance who shall be considered transient merchants; to regulate, license and tax their sales. The court says that such an optician's business may not rank professionally with that of a surgeon or physician, but his business bears a close relation to theirs, in that he assumes to diagnose, and, to a certain extent, remedy, a physical defect. His skill and experience in this respect constitute his capital and his "stock in trade," and the fact that he finds his compensation in a profit or commission on the apparatus by which he aids defective sight does not make him a merchant.—J. A. M. A.

RIGHTS OF SICK CHILD WITH RELATION TO ITS CUSTODY.

The Supreme court of Louisiana holds, in the case of State vs. Jones, where a father sought by habeas corpus proceedings to recover the custody of a child that was about two and one-half years of age, weak and sickly from its birth, and which had always been taken care of by its grandmother, that, regarding the family and the right of the father, there remained authority enough in the courts to protect the life and health of the motherless, small sickly child, by decreeing that it remain with its grandmother, to be taken care of and to receive needful nursing. It says that it might be that, under a very strict and severe interpretation, in view of the (uncontradicted) testimony of the physician who had attended to the child from its earliest infancy, and who had testified that it would not be safe to take it away from its grandmother, would, to say the least, be hard on the child. This child, under Nature's laws, has some rights, not always to be overlooked. The parent's will is not always supreme. There may a case arise where exceptional parents take it out of the grasp of the law here invoked. The law does not interpose with an iron hand to sever a union essential at the time to the very life of the child. The law should be loved, rather than feared, and to this end there are cases in which equity is not to be denied all hearing.—J. A. M. A.

EXPERT EVIDENCE ON PHYSICAL ABILITY TO COMMIT CRIME.

The Supreme court of Alabama says that it understood certain questions asked a physician in the homicide case of Dixon vs. State to call for the professional opinion of the witness whether a person suffering from malaria with bilious complications, and in a high fever late in the afternoon, could walk twelve miles and go through the ordeal of killing a man overnight, and be free from fever and of normal pulse early the next morning. This was, of course, a matter for expert opinion. Neither the jury nor the court could know what effect the physical exertion of walking so great a distance and the mental excitement incident to doing murder would have on a man in the accused's condition. A physician would know whether such conduct on the part of the accused would likely aggravate his fever over-night. Assuming an opinion that it would, the fact that the accused had no fever the next morning, taken in connection with the opinion, would be a pertinent circumstance tend-

ing to show that the accused had not gone to the victim Gordon's house and killed him. It was the same legal question as if it had been shown that the accused was desperately ill on the eve of the homicide—in the last stages of consumption, for instance—and his physician's opinion had been that he could not have gone to Gordon's, killed him, returned, and himself survived the night, and that he was alive the next day. Or, for further illustration, the question stood on the same legal footing as if it had been shown that the accused was critically ill and in a very weak and helpless state, and the physician's opinion as to whether he could have walked to and from Gordon's house at all; and it seems clear to the court that such expert opinion in either of the cases stated would have been competent. Therefore, it concludes that the Circuit court erred in sustaining objections to the question calling for the expert opinion of the physician to the effect that the condition of the accused on Sunday afternoon was such that he could not have walked to Gordon's that night and killed him and returned to the place where he was stopping and been in the physical condition he was found to be in at 8 o'clock the next morning.—J. A. M. A.

PECULIARITIES AND REQUIREMENTS OF DYING DECLARATIONS.

The Supreme court of Kansas says, in State vs. Knoll, that a dying declaration is heresay evidence, and is taken out of the rule excluding such evidence, because of reasons of necessity, and because it is supposed that a realization on the part of the declarant of the certain and speedy approach of death affords as powerful incentive to tell the truth as does the administration of an oath. In order to render such declarations admissible, it must be first shown that the declarant was not only in articulo mortis (at the point of death), but under the sense of impending death, without hope of recovery, at the time such declarations were made. But the statements made in this case by the declarant that he had to die of the whipping he had received from the defendant, and that any hour, any day, he might die, the court does not consider sufficiently showed his sense of impending death to render his statements competent as dying declarations. At the same time he says that it is quite true that, where he sense of impending death, without expectation or hope of recovery, exists at the time of making of the statement, such statement is not rendered inadmissible by a subsequently entertained belief or hope on the part of the deceased that he may recover.—J. A. M. A.

LIABILITY FOR CRIMINAL ACT OF PERSONS WITH DELUSIONS.

The Supreme court of Alabama says, in the homicide case of Porter vs. State, that the mind may, in a sense, be said to be unsound where its possessor is suffering from delusions, hallucinations, and illusions, and yet he may be held responsible for a criminal act, where the intent is an essential ingredient of the offense, if these things are not the products of a diseased brain. In this case, it was open for the jury to find, under the evidence, that the species of insanity or mental unsoundness, if it existed at all, with which the defendant (Porter) was afflicted was a temporary aberration which sometimes accompanies or follows intoxication, and is often accompanied by delusions, hallucinations, and illusions. This is not such insanity as confers legal irresponsibility. Insanity, to relieve from criminal responsibility, must be caused by or result from disease or lesion of the brain. Furthermore, if the defendant was afflicted with a disease of the brain which rendered him insane, he may have known it was wrong to take the life of the deceased, and, under the evidence, it was open to the jury to so find. If he had this knowledge, in order to relieve him of criminal responsibility, two conditions must concur: (1) If by reason of the duress of such mental disease, he had so far lost the power to choose between the right and wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed; (2) and if, at the same time, the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product of it solely.—J. A. M. A.

LIABILITY BETWEEN TOWNS IN CONTAGIOUS DISEASE CASES.

The Supreme Judicial court of Maine holds, in the case of the Inhabitants of Machias vs. the Inhabitants of Wesley, that the right of towns to recover expenses incurred in cases of contagious diseases is governed by statute. The fact that the statute gives to the overseers of the poor of the oldest incorporated adjoining town the care of persons found needing relief in unincorporated places does not make such adjoining town liable to reimburse another town for expenses incurred in relieving such destitute person. The result is the same if the expenses were incurred by the local board of health.—J. A. M. A.

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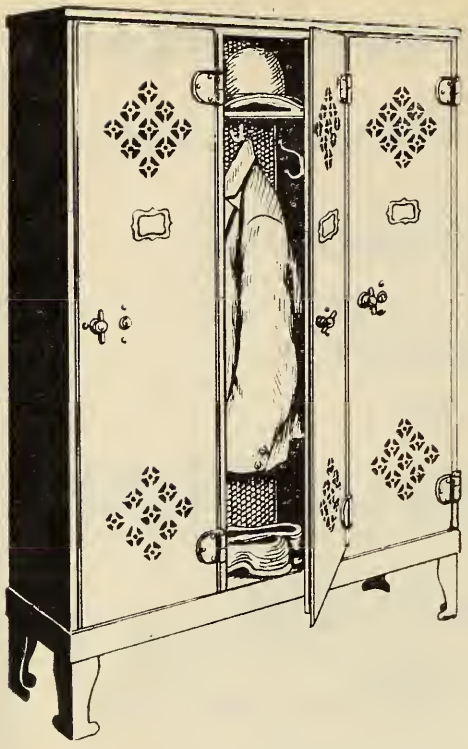

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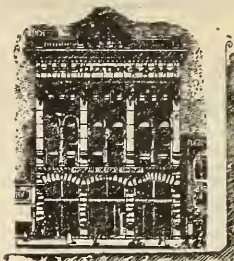

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Immediate notice by telegram, must be given the company at the Home Office at Fort Wayne, Ind., of any suit brought or demand made, and the holder hereof shall immediately forward the summons, or other process served, and the complaint or petition filed, together with a full and complete history of the case and services rendered.

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No suit or claim will be defended by this company, under this contract, in which the cause of action arose previous to the date of this contract.

This contract does not cover criminal prosecutions nor suits for assault, criminal abortion, foeticide, homicide or other criminal act, or actions arising by way of counter-claim or recoupment.

The company may cancel at any time the unexpired portion of this contract upon written notice mailed to the holder hereof, and the unearned portion of the consideration therefor, shall be returned to the holder hereof.

This contract does not take effect until the consideration therefor shall have actually been paid to the company or its authorized agent, but if the holder shall have paid such consideration and shall have received from the company or its duly authorized agent a memorandum certifying such payment and that the contract is to be subsequently delivered, then this contract shall be dated as of the date of such payment and shall be in force and effect from that date.

This contract shall not lapse at the end of the time as stated above if the holder hereof shall pay the annual consideration in advance at the Home Office in Fort Wayne, Ind., or to an authorized agent of the company, in exchange for the company's receipt, signed by the president and secretary and countersigned by the agent, but shall continue in force for the term or terms for which such annual consideration shall be paid; provided, however, that the liability of the company under such extension shall not be cumulative.

No consideration or agreement contained in this contract, or application for same, can be waived or altered in any manner by any person, other than the president or secretary, in writing endorsed hereon.

In Witness Whereof, The Physicians Defense Company has caused this contract to be signed by its president and secretary and its official seal attached hereto in Fort Wayne, Indiana, this _____ day of _____ 190__.

Miles F. Porter
President

_____
Secretary.

Medico-Legal Bulletin.

ORIGINAL ARTICLES

THE STATUS AND CHARACTER OF EXPERT TESTIMONY.

By Robt. W. Flourney, A. B.

In a fifteen minutes' paper I shall endeavor to give you a brief statement of the status and character of expert testimony or opinion evidence, and some notion of the just relation of the expert witness to the case in which he is called to testify.

Opinion evidence has fallen, particularly in modern times, into some disrepute with the courts and with the public, but this is due to reasons which do not detract from the value of scientific research, or of scientific conclusions in matters where science may fairly speak with authority; but to reasons which arise out of the legal method of producing this kind of testimony, the too frequently partisan attitude of the witness called to produce it, or the insufficiency of the data on which the opinoin is based in the particular case. It is a principle of law of general application in the trial of cases that the facts must be testified to and the jury or the court, as the case may be, left to pass on the significance and weight of the evidence, and to deduce from such evidence conclusions, unbiased or unassisted by the opinions of the witnesses.

In certain classes of cases, however, where the testimony involves technical skill and knowledge, and an ordinary mind, uninformed in the particular art or trade or science in question, would be unable to properly estimate the significance of the facts testified to, in relation to scientific or tecnichal matters, our law permits the tribunal trying the case to be aided by the testimony of experts as to their opinions based on a knowledge of the facts involved, or on a hypothetical case, stated in accordance with the evidence; the opinion being confined to the elements presented by the case on trial.

There is a step between the rule limiting testimony to the bare statement of facts, as recalled by the witness, and that which admits expert opinion evidence, found in that class of cases where witnesses, without technical knowledge of the matter under investigation are permitted, having personal knowledge of the facts on which

they base their conclusions, to testifiy to their opinions in regard to conditions where one of ordinary information might resonably deduce the right conclusion from the evidence within the knowledge of the witness. As, for instance, one having been in contact with another and having personal knowledge of his habits and deportment, may be permitted to say whether in his opinion such other person is sane or insane; while the scientific classification of the patient's dementia, or an opinion as to the causes which give rise to it, could be properly testified to only by one who qualified himself as an expert in this particular class of diseases.

On the other hand, there is a distinction in the law of Texas between opinion as to condition; for instance, mental state, and opinion as to capacity to do a legal act, as to make a will. The first is admissable in evidence as concerning only an issue of facts. The last is inadmissable, because it involves a legal conclusion. So decided by our Supreme Court in a case relating to the mental capacity of a testator to make a will. The foregoing brief statement will give you some notion of the scope and function of opinion evidence.

Now, to illustrate the unsatisfactory nature of some opinion evidence, I may remind you of the Leutgart case, tried in Chicago in which scientists of high authority testified as experts, both for and against the character of certain bones, found in the defendant's soap vat, as human bones, and certain elements in the fluid found in the vat, as indicating the presence originally there of human blood and human flesh. The verity of the conclusions of the experts in this case, and in others like it were principally impaired before the jury by the conflict of the testimony of the different experts; this conflict might be due to either the partisan interest of witnesses sufficient to bias their judgment, or which is more probably the case, to insufficient data for a sound and definite judgment, arising out of the condition of the materials which were submitted to scientific test.

In a report of a hearing in the proceedings against Patrick, who is charged in New York with having forged the will of Mr. Rice, I was impressed with the testimony of certain experts on handwriting who all seemed to agree that the signature under investigation was not the signature of Rice, but were unable to say whether Jones, the alleged conspirator with Patrick, had made the forgery. It could probably never be proven with absolute certainty that Rice did make the signature in question, he being dead; even though the defendant were acquitted it would still be possible for the experts to defend their opinions on the ground that it was not certain that they were wrong, though a jury had found otherwise. If, on the other hand, they had risked their reputations on the statement that Jones had forged the signature, this might be absolutely contradicted by a confession or other irrefragable proof that some one else had done it.

This testimony would impress one as, to use a term of art, "hedging," and betrays a certain inconsistancy which is calculated to induce the jury to reject such opinions and exercise their inalienable right of having opinions of their own, which you well know are of considerable more consequence, at least to the litigants, than those of the witnesses.

In reviewing the argument against expert testimony, I am convinced that much of it which assails evidence from this source as untrustworthy is equally applicable to the testimony of witnesses of every character. When the lawyer is daily met in his practice with conflicts in evidence over matters about which, when proven, there can be but one opinion; and when witnesses disagree as to facts about which there seems no excuse for mistake or honest difference, he becomes more lenient in his estimate of those who, through ignorance, or pride, or unconscious prejudice, are led to confusion in matters of mere opinion. Above every reform in rules of evidence, is needed integrity in the witness, and with respect to this quality I believe that members of the learned prefessions are more to be relied on than the average of witnesses who are called to the stand. As science widens her domain and the pursuits of men multiply, the law finds itself more and more in need of the assistance of those who can speak with authority on technical problems, and it is not at all desirable that we shall even attempt to do away with this assistance, even though the effort to get it by the means now in vogue is often productive of only negative results.

Much better reasons exist against the law's method of producing this class of testimony than against the tesimony itself. The medical men have furnished some instructive arguments on this line, and have put the instructions from the standpoint of the medical expert witness in an able manner in several papers contributed to the journal literature in the last few years.

One of the principle objections made is that there is no sufficient rule for the qualification of witnesses as experts; that the distinction is not carefully drawn by any competent examination between the expert and one who, without the capacity, holds himself out as such. As the law is now, the qualification of the witness as an expert is a question for the court, to be settled on a preliminary examination in the hearing of the trial judge, or conducted by the judge, and is, too often, a perfunctory questioning, which is productive of little more than the witness' declaration, in substance, that he knows all about the branch of knowledge involved. For this laxity in examination, both attorneys and court are more or less to blame, and, even under our present system, a precedent established of a more rigid test of the knowledge of the witness, offered as expert, would be fruitful of good reesults. To this end, a reasonable notice to the opposite party

that a witness would be so offered, if provided by statute, would, without deranging the existing procedure, give diligent counsel an opportunity to prepare on the important issue of the qualification of the witness.

Another vigorous objection is to the hypothetical case. If the witness has no personal knowledge of the facts on which to form his opinion, he will not be permitted to base an opinion on the statements of other witnesses in evidence, at least when there is any conflict in such other evidence. To make his answer admissable a hypothetical case must be put, constructed out of the evidence and containing nothing more than what has been testified to, but not necessarily all of that. The party putting the question will, as a matter of course, incorporate in it that portion of the testimony which he regards as favorable to his view. On cross examination, other elements will be injected into the inquiry, founded perhaps on testimony at variance with the basis of the direct examination, and the expert, getting out a partial view at a time, finds himself at last embarrassed by apparent contradictions in his testimony, which he could explain perhaps if permitted a fairer view of the case and a full discussion; but this being the peculiar prerogative of advocate and judge, he must endure, with the best grace he can summon, the twittings of the one and the frown of the other, and solace himself with the reflection that though he may be misunderstood in court, he can still command, by right of his skill, the patronage of those who, discrediting him in litigation, will still employ and pay him in the gravest concerns of business and domestic life.

To meet these difficulties, it has been proposed that hypothetical questions be abandoned, and that the expert either hear all the evidence as produced, relating to the opinion he is to advance, or have a copy of such evidence supplied to him. The first method would require his presence practically throughout the trial, which would be expensive to the parties and inconvenient to the witness, and, as in the case of a medical practitioner, a restraint which would injure others as well as himself. The other method seems more practicable, but when asked to give an opinion based on a portion of the testimony, when he had read all, the witness must have a singularly well balanced judgment not to include, even unconsciously, in his opinion on the part, his notions of the credibilty of the witness or the relative value of conflicting testimony, gathered by him in reading the whole, these last being matters exclusively within the province of the jury. It is very hard to devise a method, other than our present system, which will not, where the important issue is purely a technical conclusion, make the expert witness virtually try and determine the whole case.

In American Law Review, Vol. XXXII, No. 6, is an article by Mr. Endlich, presenting, in detail, proposed reforms in the legal procedure relating to expert testimony. Of these the most important

and feasible in my judgment, are the abandonment of the hypothetical method of interrogation, a stricter test of the qualifications of the expert, a limitation by the trial judge of the number of such witnesses to be called by each party, allowing to each an equal number, and where there is a conflict in the expert testimony, a duty of the trial judge, and in other cases his privilege, to summon an expert of his own selection, to review the testimony of the other experts, subjecting himself to cross examination by the parties. If the courts expert is confined to a review only of opinions of other experts, being supplied of course, with the grounds on which each such opinion is based, the element of the weight of the non-expert testimony and the credibility of the witnesses would be eliminated from his consideration. The opinions he reviews should be obtained, in the first instance, I think, not on hypothetical questions, but on statements, made from the record, of that portion of the consistent testimony relating to any theory which the party interested may desire to submit. In each interrogation the witness would then have before him only so much of the evidence, and that free of contradictions, as might relate to the phase of the inquiry at that moment presented to him.

The subject I am hastily reviewing is also discussed in an interesting paper contributed by Judge Willard Bartlett in Vol. XXXIV. No. 1, of the American Law Review. I lay no claim to originality in most of the views here expressed, but there is little that is really novel in law. We "gentlemen of the bar" are slow to experiment, and the value of suggestions is certainly not diminished by their full and frequent discussion.

In conclusion, permit me to offer, in the light of existing conditions, some advice from the lawyers' standpoint, as to th expert's attitude when serving as a witness. In the first place, the man of science, however broad his attainments, should seek to divest himself of that pride of opinion which is a fruitful source of error. It is needless to say that he should separate his professional judgment completely from any personal interest which he may feel in the cause of the party who calls him to testify, and rid himself of all bias in his opinion, for this is but common honesty; but in addition he should strive, particularly on the witness stand, for that intellectual honesty which will enable him to revise his own views by every fact and circumstance which tends to assist him in his pursuit of the truth. It is much easier to do this in a diagnosis or estimate, where life or property are at stake on the judgment of the expert in his private relations, than on the witness stand where the evil consequences of a too rigid adherence to preconceived notions are not so immediate and apparent, and where the interlocutor is either persuasive if friendly, or perhaps aggressive and disagreeable if hostile, in his manner towards the witness.

Again, the expert witness should have the determination to admit

frankly his ignorance, when ignorant he is, of the particular matters inquired about. It requires a high order of moral courage sometimes for a witness to say candidly, "I do not know." All sciences are not exact, human judgments are sometimes fallible, and it is not given to us, in this world of finite things, to be absolutely sure of everything. My observation is that the greater the learning and experience of the expert in any department, the less inclined he is to arrogate to himself the claim of infallibility in branches of empirical philosophy, where the problem presents complex conditions and elements more or less undeterminable. I can readily understand how a conservative, modest diagnostician, for instance, would feel justified in treating a dangerous disease according to a diagnosis which is as nearly correct and satisfactory as medical science and skill can make it, and yet would not claim before any tribunal an impossibility that he could be mistaken. In the direction of our human affairs we can proceed according to the lights before us, having exhausted our best means for information; but to say even then that there is no possibility of error in matters where, palpably, reasonable differences of opinion may arise, is to stulify ourselves even before common intelligence and to destroy the weight of our opinions, no matter how well founded on reason.

Men of your profession are oftenest called on in the courts of this state for expert opinions, and in the great majority of cases where medical men of approved ability and learning serve in this capacity there has been no just cause to criticise their attitude or to accord to their testimony less confidence than is freely reposed in their judgment daily by all classes of society in the settlement of those questions of relief to the afflicted which most nearly concern our domestic tranquility.

If I have offered anything in this paper which will assist you in preparation for these public duties, hereafter, I shall have contributed a mite to the discharge of the debt my profession owes yours, for the demands we have made on your time and patience when you are called as expert witnesses.—*Texas Courier-Record of Medicine.*

CORONERS.

By A. E. Gammage, LL. B., Chicago, Ill.

The recent tragic death of the chief minister of the Czar of all the Russians calls our attention to a custom prevailing in Russia and which is not entirely obsolete in America—that of permitting a dead body to remain on the spot where found until removal by the proper authorities after an investigation into the cause of death. This was the custom in England centuries ago and therefore the law, for the common laws of England are but the customs of the people of England

in practice so long that "the memory of man runneth not to the contrary." Therefore I say that as late as the days of Blackstone (1765) it was the law that the coroner must sit and view the body on the spot where the body was found, for unless the coroner viewed the body he could not sit—hence the coroner would have no jurisdiction to inquire into the circumstances of a suspicious death where the body was lost at sea or in a pond or stream and could not be recovered. It is not necessary that the whole body should be recovered to give the coroner jurisdiction as was decided in the case of the people vs. Luetgert. The defendant, Adolph Luetgert, was accused of immersing his wife in a vat of caustic soda and no part of the body was found except a sesamoid bone about the size of half a pea, which it was supposed was a part of the skeleton of Mrs. Luergert, and this was a sufficient *corpus delicti* to give the coroner and the courts jurisdiction to inquire into the suspicious death and to place the accused persons on trial for the crime.

We learn from the press dispatches that the Russian official recently assassinated was covered up with a policeman's coat and lay where he was killed till the officer whose duty it was to inquire into violent deaths could view the remains and order the same to be removed, which indicates that to be the law in Russia, else so great a Russian would have been taken to some more fitting temporary resting place than in the middle of a public street.

There is a prevalent belief that such is the law in America, as indicated by an incident which occurred in an Illinois city of 20,000 inhabitants a short time ago. This city is on the border line between two counties, the city government being located entirely in one county, but the city park is located in an adjoining county.

A man committed suicide in the park during the night and his body was found by the park policeman the following morning and the policeman telephoned for the city police ambulance which arrived on the spot in a few minutes, but the wise officer in charge decided that he could not touch the body and that it must remain where it was found till the coroner of the county could arrive. The county seat being forty miles away, it was eight hours before the coroner arrived, and all day that dead body lay exposed to the blistering sun and the flies just because of the belief that the coroner of the county should first view the body. In barbarism there was no difference in the two cases cited between Russia and America.

It is the duty of the person who finds a dead body to summon assistance and remove the body to some decent place, sheltered from the elements and the public gaze, first making mental note of the position of the body and the state of its surroundings.

Inasmuch as there is considerable darkness concerning coroners in the mind of the average physician a few facts may be of interest.

The office of coroner is a very ancient one and at one time a very honorable one. The office first mentioned in a charter granted in 925 by King Athelstan to the authorities of Beverly. Under this head came the lord chief justice and puisne justices of the King's bench, who are supreme and sovereign coroners respectively. The office has lost much of the honor and respect it had in ancient times. So great was the dignity of this office that coroners would not condescend to be paid for their services. They were chosen for life or during good behavior. The office of coroner was brought to America by the colonists along with other institutions of the English common law.

The coroner is a county officer, and in America is elected at certain intervals. His is both an administrative and judicial office.

His judicial authority relates to inquiries into causes of sudden death, by a jury of inquest, *super visum corporis*. The coroner cannot delegate his authority to anyone except by express provision of the statute.

The coroner is protected from responsibility in a civil action brought by a private person as are all other judicial officers. He may hold an inquest on a body brought into his county no matter where death may have taken place. Hence, if it becomes necessary to hold an inquest after burial of the body the coroner of the county where the body is buried is the proper officer to exhume the body and conduct the inquest. A coroner can hold no second inquest in the same case unless his inquest is quashed by a court of competent jurisdiction and a new inquest ordered. A coroner cannot set aside his own inquest, and when once the verdict is rendered his jurisdiction of the case ends. In view of the fact that the duties of the coroner often involve the character, liberty and perhaps the life of one accused of crime, great care should be taken by the citizens of a county to elect an educated, careful and honest man for this important office.

The coroner's jury must also view the body and in case of post mortem examination should view the body before the post mortem as the law contemplates that the jury should see the body in as nearly as possible its condition as when found dead, and not after it has been mutilated by the surgeons, but the post mortem should not be conducted in the presence of the jury. The jury should view the body and the inquest then be adjourned long enough to permit of a post mortem and to prepare a report on the same. It is discretionary with the coroner to cause a post mortem examination and to select the surgeons and to allow others than the surgeons present at the time. Under the common law no person has a right to be present at the post mortem examination upon the ground that he is suspected of having caused the death.—*Physio-Medical Record.*

EXPERT EVIDENCE IN COURT.

By R. S. Joyce, M. D., Ogden, Utah.

It is stated on good authority that with the multitudinous troubles devolving upon Adam and Eve in their first great combine they were free from all kinds of suits. Many generations followed in their simple footsteps before the personal injury business began to thrive. While each man tilled his own acre of soil with an ox and crooked stick, harvested his crop with a sickle and threshed it with a flail, there was little chance of a serious personal injury. Jurymen of that day, if such there were, were conversant with all the tools and appliances in common use, and the injured either died or recovered without medical aid. Civilization progressed, and men became employer and employee. Machinery began to replace crude implements in industries of ever increasing magnitude. The sickle has been forgotten, and the ox is known only because his picture is still in the primer. Intricate devices known only to a few who have made a study of them, have multiplied so rapidly that to know all today is impossible. With the disappearance of the plough and the sickle, and the advent of civilized appliances, has come a new set of human beings with protected bodies and baby digestion. Their muscles are flabby, and jaws too small for the number of teeth. They ride to work, if work it can be called, or, if of the gentler sex, sleep until noon, and by the glare of electric lights they turn day into night. They require stimulants to coax their appetite and sedatives to produce sleep. To live without manual labor is the problem of today. No wonder, then, that mental aberrations are more numerous, and no wonder that the problems confronting us in personal injury cases are more complex.

Has the method of deciding controversies kept pace with the march of time? Let us see. A man is injured in a factory where none but skilled artisans are employed. He or his companion employs a surgeon to attend him and to restore him to health and usefulness. Have we as surgeons kept abreast of this march? Are we sufficiently posted upon the effect of injury upon various temperaments ranging from the nervous wreck to the athlete? Do we consider the recuperative power of each subject as it will be affected by his future vocation? Are we posted as to the effect of rheumatism and syphilis as connected with injury, or should a defendant pay for generations of disease and vice?

Nearly every state now has a medical-practice law which stipulates who shall and who shall not practice surgery. So far as caring for the average injury, only men who are competent are admitted. Most any man can set a limb if broken, or sew up a flesh wound. This average good judgment is a credit to the profession. Unfortunately, however, comparatively few such cases uncomplicated are ever heard

of except by the doctor or the country newspaper. We, too, have advanced. We are told that in ancient times the duties of the physician lawyer and priest devolved upon one person. Medicine was practiced according to rules and specific regulations contained in sacred books. So long as the physician kept within these rules he was safe from reproach and persecution, but if the rule was transgressed he might be tried and put to death.

Greece and Rome knew nothing about personal injury suits so far as physicians' testimony was concerned, for the physician was called to treat the injured. The layman testified to the patients disability in court, and the court decided without medical testimony what the damage should be. The bodies of those who had been killed violently was exposed to public view that anyone might say what had caused the death. Of course at this time no such intricate questions as traumatic neurasthenia were considered.

About the year 500 A. D., the physician or midwife decided such questions as pregnancy, rape, poisoning, and insanity, and the court was bound by such evidence. The number of physicians to a city was regulated by law, and their word had some weight. History says that these questions were determined by physicians. It does not mean, I take it, that each side to a suit employed physicians, who appeared in court as much prejudiced as the opposing counsel, and without having seen the wounded or the deceased, answered a hypothetical question covering four typewritten pages, yes or no. History neglects to say that each of these physicians felt as if he were the culprit before he got off the stand; that he was confronted with authorities, *ad nauseum*, as contradictory as the verbal testimony, and with books of known and unknown authorities—books whose excuse for existence is more of a mystery than their contents. When all this conglomeration of good and bad, intelligible and unintelligible testimony, running over days and even weeks, is concluded, it is at last submitted to twelve farmers unaccustomed to city life or indoor confinement, who are anxious to get home, and whose constant sitting has made their gluteal region more sensitive than the cerebrum.

Although medical men were called to decide points relating particularly to their profession from the 5th to the 15th centuries, medical testimony, as we now understand it, was not legally recognized until about 1500 A. D., and Germany seems to have led the world in its introduction. Under the code adopted in 1532 physicians gave testimony in court as any other expert might. For three centuries afterward there was but little literature to guide the medical expert. Half a dozen text-books on the subject is probably all that can be discovered. The 19th century, however, marked an awakening in medico-legal literature, and today we have authorities sufficient in number at least to satisfy the most critical.

Idle men sometimes write very readable books, and oftentimes books are placed on the market whose author would gladly recall them a few years hence. In litigation every edge is made to cut, and you are confronted with a book whose author is unknown to you, but for fear of seeming ignorant you admit that he is an authority. If you are not familiar with his work it is a poor authority for you to tie to. If the book is over ten years old, and no demand has called for a later edition or revision, you may safely say that you do not consider it the best authority. If the book finds no place in the best medical colleges in the country its value is uncertain.

What I would urge upon the medical fraternity of today is to cultivate a habit of constant reading that we may honestly say what is and what is not authority. Nor are the new things always good unless presented by men of recognized authority as medical teachers in good colleges. "Scrivner's Palsy" affects a majority of doctors, but "Scrivner's Itch" is not unknown to the profession. It is difficult to thoroughly lay an abtruse medical problem before the average layman. He has read newspaper ads from day to day that destroy your fine theories. He has a friend who knew a man who lost his arm through vaccination, and another who was cured by the local application of a black cat skin. He knows this friend, and he only knows you by reputation. Perhaps you have been instrumental in collecting a bill from him. Perhaps you are not of the same political or religious persuasion. If so your theories are likely to be wasted.

The standard of the medical profession is higher than that of any other. Its members are among the most honorable in any community, and yet the testimony of the medical expert is the source of derision. Two or more physicians meet at the bedside, go over their case and arrive at an amicable understanding. That decision is accepted by all at interest as supreme. The laity seldom trifle with such a verdict. Many wise legislators have tried to solve this difficulty, but I say it is for us to "work out our own salvation." When called upon to testify in court it is our duty to consult, not to fight—to meet as honorable, educated gentlemen, and decide as we would were it a bedside consultation. What the patient says or what his friends say has but little weight in arriving at a diagnosis. The means at hand for physical diagnosis make the patients' story useless, or should do so. The dependent wife and children, the horror of the accident as recited by the patient, are nice historically, but perhaps the man was not hurt at all. The average man or woman exaggerates his ills as he relates his story. What, then, must he do if his life or a fortune depends upon his making things as bad as possible? A patient with normal pulse and temperature, normal reflexes, no deformity, swelling or atrophy, clean tongue and soft skin, normal lungs, heart and urine, is not entitled to much sympathy from a doctor. A man or a woman

who never was said to be insane prior to the commission of a crime certainly got crazy at a very opportune moment.

Medical testimony is often more confusing than enlightening to the jury. It has become a practice for many attoneys to employ regular experts whenever they have a suit where medical testimony can be inroduced. These men often testify on a contingent fee. The lawyer gets $2,000 and the doctor $50, if the suit is finally won in the supreme court. Corporations and the state procceed along similar lines, with the exception of the contingent fee. In their case the physician gets nothing at all in most instances. It is like a political skirmish: Men who are honest in ordinary matters become interested in a case and line up for battle, and he who can reach through the juryman's hide is triumphant regardless of the medical facts.

Outside of courts of justice such things as "railway spine" and "traumatic neurasthenia," "emotional insanity," and "color blindness" from injury are spoken of by the profession as a huge joke. Why have they become fixtures in court? Simply because from our indefinite knowledge of some vague subjective symptoms we have permitted a coinage of words, which, like the mule, has "neither pride of ancestry nor hope of posterity." Let me recite a case or two.

A woman was thrown forward in a chair-car, and struck her forehead against the cushioned seat in front. It produced no mark. One of her physicians swore that after a thorough examination she had, as a result of this injury and nothing else, loss of voice, leakage of the heart, dilated stomach, floating kidney, ovarian trouble, misplaced uterus, and traumatic neurasthenia. She got a small verdict.

Another: A man was thrown against the seat and had two ribs fractured, but not broken, and the heart violently thrust five inches to the right into the mediastinum, where it remains, giving the apex beat over the ensiform cartilage. Like a triangle of pool balls, these organs, after the first shot, strike every cushion in the body. I venture that old Dr. Gray has worn his coffin smooth turning over when he hears such testimony. It is such testimony, and not legitimate facts, that has discredited the medical man in court. In my judgment it is largely due to the individual method of arriving at conclusions. If, after years of experience, you have never seen a case similar to the one complained of, you should be cautious about giving a positive diagnosis.

What usually becomes of your own broken bones and sprained ankles, your wrenched backs and bruises of all degrees of severity? They get well as soon as the bill is paid. How many bumps and bruises or broken bones have you had yourself, and what has become of them? This should run through your mind if you want to be fair. What a man does when half drunk or when angry or provoked is not necessarily insanity. It may have been the proper thing to do. Let

me say now, lest I be misunderstood, that the corporation surgeon or state physician is not an angel, and I do not impeach the veracity of the prosecutors as a whole, for they are often forced to testify against their will, and in the heat of battle become imbued with the line of argument of an anxious attorney and a more anxious client. I believe the average physician could answer questions more intelligently were they asked by a physician, and not garbled second-hand through an attorney; but this is not permissible.

If there is anything of virtue in expert medical testimony, we, as physicians, must decide how the problem is to be solved. If the court will not permit one physician to question another on the stand, then we should do so in private and render our conclusion on the stand. We owe this to ourselves whether it please the public or not.—*Northwestern Lancet.*

The Pure Food bill before the United States Senate reads as follows: "To investigate the adulteration of foods, drugs and liquors when deemed by the Secretary of Agriculture advisable, and the Secretary of Agriculture, whenever he has reason to believe that articles are being imported from foreign countries which are dangerous to the health of the people of the United States, shall make a request upon the Secretary of the Treasury for samples from original packages of such articles for inspection and analysis, and the Secretary of the Treasury is hereby authorized to open such original packages and deliver specimens to the Secretary of Agriculture for the purpose mentioned, giving notice to the owner or consignee of such articles, who may be present and have the right to introduce testimony, and the Secretary of the Treasury shall refuse delivery to the consignee of any such goods which the Secretary of Agriculture reports to him have been inspected and analyzed and found to be dangerous or falsely labeled or branded."—*A. M. Journalist.*

AMPUTATED WRONG FOOT

Attorneys Fisher, Pierce and Smith, of Janesville, October 25th received a verdict of $10,000 for the plaintiff in the damage action of Paul Parkhurst vs. Drs. Nuzum and Sutherland, of Brodhead. The plaintiff is but 9 years of age and the two defendants amputated the wrong foot while performing an operation to relieve the boy from being a life cripple.

State Medicine.

Under this head will be published articles relative to the application of medical knowledge to the public welfare. It includes forensic medicine, public hygiene, medical ethics, medical education and military and naval medicine.

Communications, articles and reports from members of state boards of health and boards of registration and examination are requested.

PATENT MEDICINES CONTAINING ALCOHOL BARRED IN SOUTH CAROLINA.

According to the South Carolina newspapers they are taking effective action regarding certain "patent medicines." Probably it is because South Carolina, through its dispensary law, controls the sale of alcoholic liquors that it is able to do what it seems to be doing. One paper speaks of drug stores being prohibited from selling Peruna on account of the alcohol it contains, and that hereafter it can be had only on the prescription of a physician. Another shows that it is not only Peruna that is barred, but Hostetter's bitters, De Witt's stomach bitters, and some others less known because less advertised. According to the state chemist's analysis, Hostetter's bitters contains 41.3 per cent., De Witt's stomach bitters 37.6 per cent., and peruna 26 pe cent. of alcohol, and consequently are to be classed as intoxicants

MUST BE VACCINATED.

A sentence of eight days in the house of correction was imposed upon a resident of North Adams, (Mass.) for refusing to be vaccinated. As the institution to which he is sentenced requires all inmates to be vaccinated, he will not only have to serve out his time, but also be vaccinated.—*Med. Fortnightly.*

MARYLAND.

By a new city license law a special tax of $10 is levied on every physician in Frederick City, commencing October 1. It is said the physicians will resist its payment, on the ground that the legislature has granted them the privilege of practicing where they please in Maryland, and no municipality has the right to tax them.—*J. A. M. A.*

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THE MEDICO-LEGAL BULLETIN is issued on the first of each month, in the interests of the medical profession from a Medico-Legal standpoint, and will spare no endeavor to furnish valuable news and information relative to legislative enactments and judicial decisions affecting the profession. Communications on these subjects are solicited from all interested. Reprints of contributed original articles will be furnished, without charge, to authors making request.

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PHYSICIAN'S SLIP LED TO DEATH OF INFANT.

Harvey H. Baker, special justice of the Brookline municipal court, has filed with Clerk of Courts Cook at Dedham his inquest report on the death of Aida P. Ross of Brookline. He finds she came to her death August 18, 1904, at 11 Harvard place, Brookline, by being given medicine containing an excessive quantity of tincture of opium.

The physician called, says Justice Baker, in signifying the quantity of tincture of opium in his prescription, intended to write ten drops, but actually wrote ten drachms. "I find this variance between intent and act to be due to one of those failures of the hand to follow the directions of the will which are of common occurrence, and the physician was not in any way conscious of the variance," the justice continues. patient in this case was only five months old. The child was given two doses and became unnaturally drowsy. The alarmed mother called the physician, who discovered the error, and tried to avert the death of the patient, but was unsuccessful.

The court further finds: "In view of the law as stated in commonwealth vs. Thompson, 6 Massachusetts, 134, and Commonwealth vs. Pierce, 138 Massachusetts, 165, it does not appear tnat the unlawful act of any person contributed to the death of said Aida P. Ross."—*Boston Herald.*

Judicial Decisions.

Under this heading will be presented each month information relative to judicial decisions affecting the medical profession.

IS PERFECTLY LEGAL.

The legality of the practice of Christian Science in New Hampshire was upheld by the Supreme Court of the state in a decision handed down in the suit of Mrs. Jennie Spead to recover damages for alleged injuries as the result of treatment by Irving W. Tomlinson, a Christian Science practitioner. Mrs. Spead claimed that Tomlinson had failed to cure her of the illness for which he treated her, and that her cure was greatly delayed by the time spent in taking his treatment. The case was decided in favor of the defendant in the lower court, but the plaintiff appealed. The Supreme Court now affirms the decision and ffismisses the bill. In substance, the court holds that the practice of Christian Science is legal, and that patients who have resorted to such treatment cannot recover any damages in case the practitioner uses the accepted Christian Science methods of treatment. The plaintiff claimed damages on three grounds, negligence, deceit and breach of warranty.

BOARD CANNOT BAR UNVACCINATED PUPILS.

Charles M. Kifer, of Barberton, Ohio, obtained an alternative writ of mandamus against the Barberton Board of Education to permit his four children to attend the public school.

The board of education ordered a few weeks ago that all pupils not successfully vaccinated should not be allowed to enter the school. Kifer alleged in his petition that his children had been deprived of going to school unlawfully since September 6, because they could not show a certificate that they had been vaccinated. He said that he does not believe vaccination prevents smallpox, and that it is dangerous.

Kifer has also sued the board of education for $1,000.

HOSPITAL NOT LIABLE FOR NEGLIGENCE OF SURGEON.

The Second Appellate Division of the Supreme Court of New York holds, in the case of Wilson vs. the Brooklyn Homeopathic Hospital, that a corporation existing as a public charitible institution, operating as a hospital is not liable, in conducting its hospital, for negligence in operating on a patient who pays only for board and attendance, and not for the surgeon's services, in the absence of proof that it failed to exercise reasonable care and diligence in the selection and employment of the surgeon. Nor was such a hospital rendered liable by testimony that the superintendant said that surgical treatment was included in the expense of room and board where it was clearly shown that the superintendent had no authority whatever to make any contract in behalf of the hospital to receive compensation for the services of surgeons or physicians in its employ.—*J. A. M. A.*

CRYING AS EVIDENCE OF INJURY.

The Supreme Court of Alabama says, in Montgomery Street Railway Company vs. Shanks, a personal injury case brought by the latter party, that crying is often symptomatic of pain, and, in connection with the other evidence of actual hurts received by the plaintiff, the fact that she cried all the afternoon of the accident was admissible in evidence as of the essential circumstances of the injury, as was also the fact that she complained of pain the next morning.—*J. A. M. A.*

ENTITLED TO COMPENSATION FOR PAIN FROM OPERATION.

The Supreme Court of Michigan says that, in the personal injury case of Beattie vs. City of Detroit, testimony was allowed to be given as to the cost of an operation. The jury was also instructed that the plaintiff was entitled to compensation "for the pain she may suffer from an operation, if an operation is deemed necessary." The court holds that there was no error in this, it being the opinion of the physicians who testified in the case, that the injury would not yield to medical treatment, but could be cured by surgical operation.—*J. A, M.A.*

RESTRICTIONS OF STATE HEALTH BOARDS.

Dr. Newel K. Foster, Sacramento, California, secretary of the State Board of Health, in his report to the governor, says that while the law imposes important duties on the board, it bestows little power, as it does not oblige local boards of health to answer interrogations from the state board, does not allow enforcement of proper measures to protect life and health, gives no means for eradicating causes of diseases and epidemics or for the dissemination of information to the people save through the good will of the press.—*J. A. M. A.*

WHAT ARE INCLUDED IN PRIVILEGED COMMUNICATIONS.

Seection 4,608 of the Iowa Code contains the provision: "No practicing . . . physician . . . who obtains such information by reason of his employment . . . shall be allowed, in giving testimony, to disclose any confidential communication properly entrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice." The Supreme Court of Iowa says, in the personal injury case of Battis vs. C. R. I. & P. Railway Company, that all will agree that the manifest purpose of this statute is to make it possible for every person to fully and freely consult with a physician or submit himself to the examination of such physician, without anticipation or fear that the confidence reposed may be broken in on by a subsequent examination of the physician as a witness in some form of legal proceeding. This being true, the statute should have a liberal construction by the courts. Accordingly this court has held that the expression "confidential communications," as used in the statute, is not to be restricted to the mere verbal statements made by the patient, but must be construed to include all knowledge or information acquired by the physician through his own observation or examination. In the case at bar the interrogatories propounded to the physician were intended to elicit from him certain facts respecting the condition of the plaintiff, and it was manifest that whatever knowledge the witness possessed was acquired from the statements made to him by the plaintiff, and from his own examination and observation. Clearly in such a case the statute applies, and the privilege may be insisted on. Nor is the privilege taken away, as contended for, by the fact that while on the witness stand, and elsewhere, the plaintiff had stated that he was unconscious when taken to, and while he remained in, the office of the physician, and that the testimony sought to be elicited had relation solely to the condition of the plaintiff as to consciousness, the purpose thereof being the impeachment of the plaintiff as a witness. It may be true, possibly, that the knowledge acquired by the physician was not, in point of fact, and strictly speaking, necessary and proper to enable him to perform the functions of his office. But of this the court is not in position to judge, nor is it called on to determine what the fact might be when reduced to a last analysis. It was the condition of the plaintiff that was the subject of the inquiry, and it was the professional judgment of the physician that was called for. The privilege can not be subject to measurement by metes and bounds, and the court may well assume that all that was told to the physician, and all that was developed by his examination or came under his observation, was necessary and proper for his understanding of the condition of his patient. The relation of physician and patient being established,

if by any fair intendment communications made have relation to the physical or mental condition of the patient, the court is bound to hold them privileged. With reference to the local surgeon of the company called by the station agent to see the plaintiff, the court says that it may be conceded that the sole purpose of the agent in calling this physician was that the latter might ascertain the condition of the plaintiff, and thus be prepared to advise the company should occasion therefor arise, or be a witness on its behalf if necessary. Certainly, if the visit of the physician had been confined to the limits incident to such purpose alone, his eligibility as a witness on behalf of the company might not be open to question. Without doubt a railway company with the utmost propriety may thus advise itself of the fact of injury and the character and extent thereof, in anticipation of a possible claim against it for damages. And with that end in view it may send a physician to inspect and take notes, or otherwise inform himself of existing conditions. But this can avail the company nothing unless the physician shall strictly retain his character as an employ of the company. If on request or on his own motion he assumes to advise or administer treatment to the patient, and the latter in any manner acquiesces therein, the physician thereby casts aside his relation as an employ of the company, and transfers his allegiance to the patient. In such instances a case is presented where one can not serve two masters at one and the same time. The allegiance of the physician must be wholly on one side or the other. It matters not in this connection who calls him in the first instance or who pays him. He may present himself at the side of the patient on his own motion, and he may not expect, or in fact receive, pay. If the physician assumes to advise or treat he should be put in possession of all facts necessary or material to enable him to do so properly. If the patient acquiesce, he should have the right to, and should communicate freely and fully, without fear of exposure or of having his confidence made common property. It was to this end that the statute was enacted, and manifestly the purpose thereof may not be frustrated by proof that, at the time of rendering professional service, the physician was under control of employment to serve the interest of the person or company subsequently charged with responsibility for the identical injury he is called on to assume to treat.

ASKS INCREASED POWERS.

The State Board of Medical Examiners of Pennsylvania has prepared a bill which will be introduced at the next session of its legislature, giving the board the power to cancel any license issued by it whenever it appears that the holder is not a fit person to be so licensed because of lack of education or unsatisfactory professional and moral character.

VESTED RIGHT OF PHYSICIAN TO PAYMENT AS PER CONTRACT.

The Supreme Court of Michigan says that, in the case of Kapp vs. Board of Auditors of Washtenaw County, the board of Health of Freedom township, in said county, made a written contract to pay for the care of indigent persons affected by contagious diseases $10 per visit and 25 cents per mile going. After the services in question were rendered, but before the bill therefor was allowed, the legislature passed an act giving it effect March 13, 1903, which provided for a change in the law giving the boards of supervisors authority to pass on the reasonableness of claims for services in caring for indigent persons, by direction of the board of health, whereas, before the allowance by the local board was usually final and conclusive on the board of supervisors. By reason of this the board of auditors refused to allow and pay the bill contracted in this case as above. The Supreme Court says that it was unimportant whether the township board of health might properly agree in advance on the price to be paid for such services or not, for the service was rendered at the request of that board, and the bill was audited and allowed by it. Had this allowance been made before the act took effect, it is clear that the board of auditors must have paid the bill, and that the physician's right could not, in such case, have been affected by the legislature. Did the fact that the allowance was deferred until after such act took effect justify the board of auditors in its action? The court's answer is that the physician rendered services under a law which made the county liabie to pay for them on allowance by the local board. The amount was agreed on in advance. He had a vested right to such payment, when lawfully allowed by the local board, and it could not be taken away or impaired by legislation, as it would be if the supervisors were authorized to question its reasonableness. To much the same effect is the second decision of the Supreme Court of Minnesota in the case of Comstock vs. Board of Commissioners of Lesueur County, where it overrules the decision reported on page 1590 of The Journal of June 11, 1904. In this second decision it holds that chapter 238, page 378, Laws of minnesota of 1901, changing the liability for expenses incurred in preventing the spread of contagious diseases from towns and villages in counties, did not change or abrogate contract relations then existing between individuals and such towns or villages. A contract existing at the time of the passage of that act, and under which an indebtedness against a village arose, may be enforced against it. Again, it says that at the time the contract here involved was entered into and the indebtedness incurred—at least the greater part of it—towns and villages are solely liable for all expenses of this kind. The rights of the parties became vested and fixed at the time the contract was entered into, and it was beyond the power of the legislature to impair

its obligation, as between individual creditor and the town or village by shifting the liability from the town or village to the county. The plaintiff in this action had the right to rely on and seek relief in accordance with the contract between himself and the village.—*J. A. M. A.*

POWER TO QUARANTINE---CONSTRUCTION OF HEALTH LAWS.

The Supreme Court of Minnesota says, in town of Iosco. vs Board of Commissioners of Waseca County, that the town, during the months of February and March, was afflicted with one case of diphtheria and a smallpox epidemic. It is claimed that under the statutes the board of supervisors of the town, together with the physician to be employed by them, when, in their judgment, necessary, constituted the board of health, and that the duty of ordering and enforcing a quarantine rested with that body as a legal entity; hence that theaction of the chairman of the board of supervisors of the town, who immediately. on notice from the cseretary of the state board of health, proceeded to employ a physician, and then take steps to enforce a quarantine, was without authority, and furnished no sufficient basis for subsequent reimbursement against the county. But the court holds that where the chairman of the town board of supervisors, on information of the secre ary of the state board of health, received information that an epidemic of smallpox was prevalent in his town, and incurred expenses to quarantine the persons afflicted therewith, but without receiving specific authority therefor from the town board of health, and the expenses were audited and paid by said board, the want of authority to order the quarantine was sufficiently ratified to authorize reimbursement from the county under the statutes in force at the time. It says that the provisions of law for the protection of the public against the spread of a pestilence are remedial, and to be largely and beneficially construed, to advance and subserve, but not embarrass, the purpose of their enactment. Effective regulations can not be promptly and successfully enforced without the employment of efficient means to accomplish that result, which requires the speedy use of the necessary remedial agencies. To delay the institution of a quarantins until the board of supervisors can be called together might defeat the very purpose of the statute, and deprive the community of the benefits intended by the health laws of the state. Hence, under an emergency such as was found to have existed in this case, where the chairman of the town board acts immediately in good faith, incurring expenses of a beneficial nature to the public, the court regards it as its duty to hold that a practical construction of the statute must be given to accomplish the purposes intended thereby. To sensibly give effect to the health laws to secure a protection of the public, a liberal and sensible view must be taken of the law to secure its object, and no technical objection that would prevent its enforcewent according to the spirit and purpose of the statutory regulations should be sanctioned.—*J. A. M. A.*

PROTEST AGAINST CARBOLIC ACID ORDINANCE.

Health Commissioner Darlington, of New York, has given a hearing to a number of druggists on their protests against the new ordinance forbidding the sale of carbolic acid in other than a weak solution without prescription. The druggists claim that it would not lessen the number of suicides, as such persons would seek some other remedy, and that the five per cent solution would be as deadly in effect if it were taken in sufficient quantity. Dr. Darlington declares that his investigation of carbolic acid suicides for the past several months showed that in 42 per cent. of the cases the acid was procured in drug stores without any difficulty.—*J. A. M. A.*

INSANITY OR UNCONSCIOUSNESS AS DEFENSE.

The Supreme Court of California says, in the case of People vs. Nihell, a prosecution for assault with a deadly weapon, that the instruction given the jury that the burden of proof is on the defendant, where the defense of insanity is relied on was, as a proposition of law, correct. It was contended, however, that the defense in this case was not insanity, but that the defendant was unconscious of the act. But this could not render the instruction prejudicially erroneous. The theory of the defense on the trial seemed to be that the defendant was unconscious from the dual effects of liquor and epilepsy. The jury could not fail to see that the instructions regarding insanity related to that peculiar mental condition that the defendant claimed to have been in, by whatever name it might be called. And, thus understood, it was correct to say that the burden was on him to establish the peculiar mental condition which he relied on as a defense. Men are presumed to be conscious when they act as if they were conscious, and if they would have the jury know that things are not what they seem they must impart that knowledge by affirmative proof. The rule as to the burden of proof was correctly stated, whether it be applied to insanity or to unconsciousness as a defense; and the refusal of instructions recognizing the opposite rule was proper.—*J. A. M. A.*

EXPERT WITNESS DESERVES EXPERT FEES.

Dr. William A. Whitlock, Merced, was victorious in a contest with the district attorney September 30. He was a witness in a suit on trial, and was asked to give expert testimony, but declined to do so until a fee of $50 had been guaranteed by the district attorney. The circuit judge orrdered Dr. Whitlock to testify; he refused, and was committed to jail for contempt of court. After an imprisonment of three hours, the attorney came to the jail, agreed to guarantee the payment of the fee, and Dr. Whitlock went back to coust and tertified. —*J. A. M. A.*

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DECEMBER, 1904

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Vol. 3 No. 3

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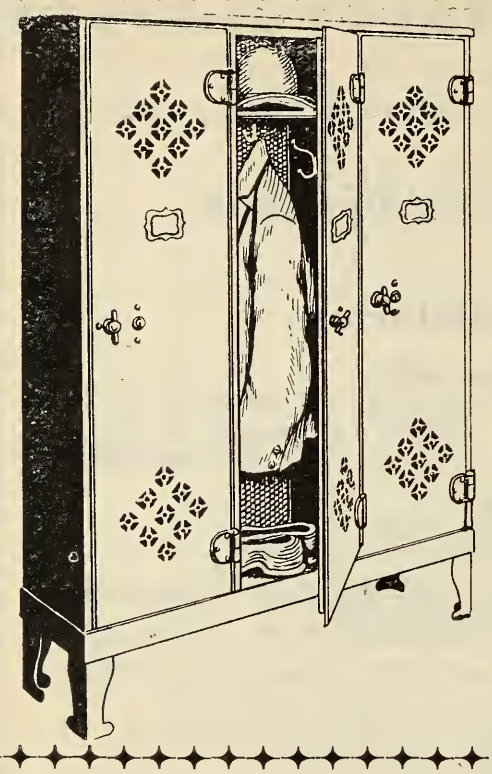

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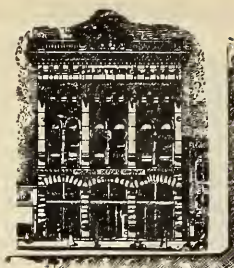

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President.

_____

Secretary.

Medico-Legal Bulletin.

ORIGINAL ARTICLES

THE RELATION OF THE PHYSICIAN TO THE BUREAU OF HEALTH.

By S. W. Newmayer, M. D., Philadelphia.

This is an age in medicine of sanitation and preventive medicine. The treatment of disease is secondary to the prevention of it. The profession has spent centuries to find the causes of diseases; and now, by evolution, we are advanced in the study of public hygiene. But it remains for us to give the practical application of the results of much labor, and prove to the world that our theories are right. The physicinas standing in the community is judged mainly by their ability to combat the diseases that may affect the masses. These are mainly the infections. The government and the people realize the need of the advice and protection from such diseases by the physician. This authoritative guidance in sanitation and forensic legislation you have vested in specialists in public health, who are grouped as a most important part of every municipal government, under the title of Bureau of Health. The profession from all over the world has labored hard to give this bureau the ideas and knowledge from which they must work. But many forget that the practical application of the principles of sanitation lacks completeness without the unrelenting coöperation of the entire medical profession.

Coöperation is the word, in which are gathered all of the duties of a physician to the Bureau of Health. An explanation of this is the object of this paper. We are not so much in need of new discoveries for the eradication of communicable diseases, but those methods which are well known to be reasonably sure defences against the spread of contagion should be more rigidly and systematically practiced.

Medical inspection by the Bureau of Health, to within a recent period, has been routine and along certain old and well defined lines. Progress was slow because of limited laws governing their power, and a false conception of the ethics due the profession. The medical practitioner has been in greater part responsible for this state of affairs, because of his disinterest in municipal work, and also an ill founded disrespect for health

officers. In like manner the physician breeds a similar opposition agianst the bureau in the families with which he comes in contact.

Irrespective of the relation of a physician to this branch of a municipality, through a set of laws laid down, he owes it a greater duty in promoting the unwritten laws of public health. We naturally expect a higher grade of morality in the profession of medicine than in other professions. To criticise the practitioner who fails to report a case of contagious disease, either for remuneration, or to so called "protect or shield the family," would only be calling attention to the dishonest and disloyal members of the profession.

The health department has no desire to inconvenience a family who has a case of infection, only to see that proper steps are taken to the protection of the rest of the family and the community. There should be no need of legally calling some doctors to account for failure to report a case of contagion, so as to set an example to other physicians. To wait for the patient to be well advanced in the disease permits of inestimable damage.

The maintenance by the city of modern, efficiently equipped laboratories for bacteriological and chemical diagnosis, free of expense to all who desire to take advantage, makes it inexcusable in most cases for long delay in diagnosis. Typhoid fever, malarial fever, tuberculosis, pneumonia, and diphtheria are ofttimes diagnosticated with ease, with the aid of the laboratory, when otherwise the diagnosis would be in doubt and possibly valuable time lost. This means of diagnostic precision is offered to you free. The work of this laboratory should materially increase, and yet the number of examinations of cultures made from suspected diphtheria has diminished in the last several years, though there has been an increase in diphtheria. The examination of the blood, in suspected typhoid fever, for the Widal reaction, seems to be the one most desired by the profession The value of this test may be better appreciated, besides the quality of work by the city laboratory, when one notes that the number of blood examinations for this reaction since 1897 was 24,588, and the discrepancy between the laboratory and the clinical diagnoses was only 4.9 per cent.

Not only would I make a plea for more accurate and earler diagnosis by the use of the laboratory methods, but a postgraduate course in the clinical diagnosis of the more common communicable diseases should be offered to physicians. The Bureau of Health should have under its supervision a series of lectures and demonstrations by competent teachers, to which the physicians should be invited to attend. This would favor a more accurate and earlier diagnosis and fewer mistakes, and thereby lessen the spread of contagion. It may surprise one to know the large number of mistakes in diagnosis in the infectious diseases. To within a recent period there was little attempt to train the student of medicine in the practical recognition of these diseases. It is surprising that so little concern was given to this subject by medical colleges, when an error of diagnosis may affect a whole community, while in the ordinary non-contagious dis-

eases it affects an individual. At the present time it is optional in all the five medical shcools of Philadelphia for the students to study the infectious diseases. And Dr. Welch informs me that the number of students who attend the course at the Municipal Hospital numbers about one-third of the classes. The remedy of this would seem to be of no small importance. It should be compulsory for every medical student of all colleges to attend lectures on the contagious diseases, and see cases in the city hospital. Also there should be given to each graduating class one or more lectures on the duties of a physician to the Bureau of Health, explaining what diseases to report, and the best methods of protecting the public.

On the diagnosticating of a contagious disease several things in reference to the family and the surroundings should be taken into consideration, in deciding whether or not to treat the patient at home. The neighborhood being a congested district; the dwelling being unsuitable for proper isolation; or small dependance being placed on the family being able to carry out strict instructions to safeguard the public. Such cases should be encouraged by the physician in attendance to be treated in the city hospital. It is fortunate that there is no longer a choice as to the keeping of cases of small-pox at home. And the greatest boon to the prevention of the spread of contagions will come when all cases of contagious disease will be required to enter a hospital for their treatment. With the completion of the new Municipal Hospital there will be an institution which will not be equalled by any similar one in the country. It is to be modern, comfortable, and well equipped for the treating of all contagions. The establishing of private rooms for those able and desirous of paying, and wards and service which will be inviting to both rich and poor, should make it impossible for the best home treatment to surpass it. With the opening of such an institution the profession should give unstinted aid in overcoming all prejudice agianst a hospital for contagious diseases. When patients insist upon remaining at home the attending physician should work in conjunction with the Health Bureau to see that every precaution is taken to prevent the further spread of the disease. The case should always be isolated on the top floor, in a suitable room, away from the rest of the family. It is not unusual for the medical inspector to find a case in the parlor or the dining room, and the rest of the family going in and out of the same room, no attempt at isolation being made. The health department desires at no time to interfere with the instructions of a physician to a family; but if he entirely ignores instruction in the necessary precautions, it becomes the duty of the medical inspector. It is in these cases that the inspector is misjudged as interfering with the rights of the attending physician.

While many physicians in the most careful and conscientious manner instruct the families of patients with scarlet fever and diphtheria, yet they pay little or no attention to their cases of typhoid fever. A physician is not doing his duty either to his patient or the community, when he merely diagnosticates and medicinally treats a case of typhoid. To him belongs

the work of aiding the Bureau of Health in finding any possible source of infection and in carrying out the sanitary laws laid down by that department. If the attending physician would request the family to give the medical inspector all the necessary information, the department would never receive such replies as "You must see my lawyer;" "I have no time," or a positive refusal to answer all questions.

To blame the water supply for the epidemics of typhoid fever in Philadelphia and elsewhere, and then sitting idly down and waiting for a pure stream to flow our way, is going wide of the mark. A study of the following statistics may prove interesting:

For the year 1903 the number of cases of typhoid fever in the twenty-eighth, twenty-ninth and thirty-second wards was 1,243. This includes that residential portion of the city west of Broad Street and between Poplar Street and Lehigh Avenue. The majority of the residents of this district are of an educated class who are most apt to use spring, filtered, or boiled water. While in the second, third, fourth, fifth and sixth wards there were, for the same period, but 662 cases. This district has about an equal population, and extends east of Broad Street, and from Wharton to Vine Streets. It comprises what is considered the tenement or poor district, and mainly a class of people who scarcely know the meaning of filtered, spring, or boiled water. But the reason I advance for this seeming paradoxical state of affairs is that the down town section has the majority of its cases of typhoid fever removed to hospitals, and here they are no longer sources of infection. Few cases remain to beget other cases.

If the city spends $50,000,000 additional to the sum already expended for filtration, and also places in every home a copper filter, we should not be preventing typhoid fever. I do not mean to belittle the absolute necessity of a pure water supply, nor do I desire to dispute the value of copper as an antiseptic. But we must not forget that one case of typhoid fever is the cause of other cases, directly or indirectly. The public has been allowed by many physicians to lapse into a careless attention of the prophylaxis of its cases of this infection. To prevent one case from infecting others we must diagnosticate the case early and destroy the bacilli from all possible sources. The diagnosis of typhoid is uncertain in the early stages, but is more positive by the aid of the Widal test. In all continued fevers the laboratory should be used as soon as possible. But the physician should not wait in these cases for a positive diagnosis, but in all continued fevers he should take immediate precautions to disinfect the tools and the urine. There is nothing to be lost by such a procedure; but much is to be gained. The physician must impress the family with the great danger of infection, and should insist on a thorough disinfection of all excreta, and a rigid carefulness on the part of attendants to disinfect their hands, etc. It is common for a medical inspector to meet a family having a case of typhoid at home for one, two, or three weeks, and no instructions as to disinfection having been given by the attending physician. The inspector's

instructions in these cases rarely attain the results which would have been had the physician given proper advice and directions. Again, by the time the bureau has been notified, much damage has been done.

It is not the object of this paper to detail the best methods of disinfection of stools, urine, expectoration, bed linen, attendants' hands, and bath water. I venture to say, however, that a careful attention to the details in the disinfection in all cases of typhoid fever would see this city almost free of the dreaded infection in less than three months.

The physician plays no small part in the responsibility to rid the city of smallpox. Every physician agrees on the absolute necessity of vaccination. The inspectors of the Bureau of Health have several times covered the entire city, in a house-to-house canvass, to vaccinate all who would submit. But many children remain unvaccinated, and many adults have not been done since childhood. There are many of these who slam the door on the medical inspector, who would graciously submit at the mere suggestion of the attending physician. In a recent canvess during July and August, there were found 2,705 infants under two years of age, among whom only 790 were vaccinated. Think of it! 1,915 out of 2,705, or about 71 per cent. remain unvaccinated. From personal observation I know the greater number of these are due to the neglect of the family physician. He is the family advisor; his word is invariably their law; and because of his disinterest, many ignorant men and innocent children are allowed to face unprotected the danger of smallpox. An inspector finds a child five years old unvaccinated, implores the mother to have it done, and she answers, "I have my family doctor, thank you." Five years the child has faced the danger, and the doctor passes in and out of the home unconcerned, and he would possibly leave many more years pass if entrance to school did not force the issue. There is no shirking of work or responcibility on the part of health officials. It is a credit not only to the bureau, but to the entire profession, to stamp out such contagion. To do this your aid is needed. Do not answer, "We are not paid for that work." There is much unpaid work in the profession and less profitable. The reward will eventually come to the entire profession.

The contagious diseases which carry off the vast majority of the human race, are those which can be greatly restricted in severity and numbers, but over which the health department has at present comparatively small control. Among this deadly list are tuberculosis, and pneumonia, and infant deaths from summer diarrhœa. For the year 1903, the number of deaths in Philadelphia, from diseases of the lungs, phthisis, pneumonia, inflammation, and congestion, was 6,333, or more than 24 per cent. or the entire mortality rate for the year; while the deaths from diphtheria, membranous croup, scarlet fever, typhoid and smallpox combined were 2,029. or less than 8 per cent. This does not include the deaths from tuberculosis in other organs of the body, and which we know ofttimes means primary or secondary infection of the lungs. So if the statistics were corrected

for this factor, we would be horrified at the statement. Now that tuberculosis and pneumonia are reportable diseases in Philadelphia, the question arises, shall we thereby lessen to a great extent this appalling condition? It is absolutely necessary to first locate the cases before steps towards restrictive and preventive measures can be taken. Placarding of the house is not desired and is useless. And any inconvenience to the patient is always avoided. The knowledge by the Bureau of Health of the presence of a case of tuberculosis is not the means of giving the least publicity to the case. The bureau may distribute literature, and even give personal instructions in the proper sanitary precautions. This must have a great tendency toward limiting the further spread of this dreaded disease, but the work lacks a pillar of strength without the conscientious coöperation of the entire medical profession. There must be a practical and concerted plan of education, every physician sparing a little of his time, education, and influence as a teacher; the subject, sanitation, and domestic hygiene; and every dwelling in which he is called in his daily work—a school. This would have an untold influence, one which could never be attained by the combined work of the legislature and Bureau of Health.

The Bureau of Health has done much toward preventing the spread of contagious diseases, and accomplished much good otherwise, by the establishing of the present medical inspection of the public schools. The school children have always been considered a great factor in the spread of contagion. The school room is the place to teach, and there could be no more profitable subject taught the children than "how to live when well or sick." While physiology is taught in the schools, it would be well for those physicians who have in their hands the revision of school text-books, the addition to such books of plain, simple talks on contagious diseases, cleanliness, and a favorable description of hospital life, that may help allay the fears of a child for such an institution. Added to the text-books, the children could be given occasional talks on subjects pertaining to their health and manner of living. A practical plan of accomplishing this has been successfully worked in one of the schools in the southern section of the city. What is termed "parents' meeting" is given by the principal and teachers of the school. At these meetings, which are of a social nature and held several times a year, the parents and their children are invited to attend. They are addressed by the principal or one of the teachers, and also by the medical inspector of the school on some subject relating to the care of their children. These meetings have accomplished much good. The parents are brought in closer contact with the teachers and the medical inspector, so when any instructions are sent home with the children they receive more and better attention.

To lessen the infant mortality rate is a subject that has long baffled the profsession,and yet all agree that impure milk and improper food is one of the chief causes of this high death rate. Though numerous dealers are convicted of selling impure milk or preserving it with dangerous drugs,

yet the crime continues. Not only should the physician and the trained nurse become acquainted with some simple methods for testing for impurities in milk, but the public should be educated along such lines, if necessary, by a corps of trained district nurses. This would give an opportunity to catch the culprtis before the harm is done.

Among the by-laws of the County and State Medical Societies are found as part of the main objects, the following words: "And to the enlightenment and direction of public opinion in regard to the great problems of State medicine, so that the profession shall become the more capable and more useful to the public in the prevention and cure of disease, and in prolonging and adding comfort to life."

With the conscientious fulfillment of such duties by every physician, I firmly believe all communicable diseases would be greatly ameliorated in severity and some would be entirely stamped out.—*N. Y. M. J. and P. M. J.*

PROFESSIONAL RESPONSIBILITY IN ACCIDENT CASES INVOLVING LITIGATION.

By JOHN B. ROBERTS, M. D., Philadelphia.

The professional responsibility of the medical attendant or examiner employed by the party sued for damages and that of the doctor of the patient injured are identical. The duty of both is to obtain, as soon as possible, restoration of the victim's health and a just settlement of the pecuniary debt of the agent responsible for the accident.

The experience of the public in recent years has caused a justifiable distrust of the opinions of partisan surgeons employed by corporations as well as of the views of experts paid by patients endeavoring to recover damages. Medical men can do more than any other citizens to dispel this doubt as to the reliability of professional testimony. The medical profession is responsible for its existence and should therefore feel an impelling duty to sweep away every cause of suspicion as to the honesty, justness, and reliability of the medical evidence.

The result of a suit must depend almost entirely on the medical testimony, and partisanship has no place in the professional investigation of diagnosis, prognosis, or treatment. Truth and justice are the two objects to be sought by doctor, lawyer, judge and jury. The doctor's single duty is to be honest and reasonable, not laying undue stress on any symptoms and not claiming omniscience.

The injuries which require medicolegal investigation may for the present purpose be divided into three classes:

1. Cases in which there is obvious physical lesion of a serious character, such as fracture, dislocation, or Rounds. Here the surgeon's medicolegal responsibility entries to a great extent in the prognosis, for the diagnosis and treatment are sufficiently clear.

2. Cases in which a physical lesion is obvious, but evidently of little importance. Here the professional responsibility is largely concerned with diagnosis, and the doctor must be on the alert to detect, by careful and repeated examinations, symptoms of obscure danger to the nervous system or other deep structures.

3. Cases of mental shock without obvious physical lesion, in which there is a possibility of the development at a later time of the so-called functional disturbances to which the term traumatic neurosis has been applied. Here the prime responsibility of the surgeon appears to me to be the prevention, by judicious treatment, of the development of the nervous derangement. Many of the nervous wrecks seen in the courts, demanding, and often receiving from juries large sums of money for accidents, are the creation of injudicious, thoughtless, or dishonest doctors.

In all these classes of injury there may be developed an hysterical or neurasthenic element; but it is in the last two classes that such neuroses are most likely to occur.

In this paper the open attitude of suspicion frequently exhibited by corporation agents toward injured persons and their medical attendants is not under discussion; but the unjust verdicts sometimes obtained explain that attitude. Crafty lawyers and dishonest doctors are obtainable in all large communities to aid in a miscarriage of justice and to bring discredit on their respective professions.

Immediate and careful examination, with accurate record of the patient's statement and of the symptoms at the time of injury, the avoidance of injurious suggestions, the prompt institution of scientific treatment, and an early settlement of damages will diminish litigation and hasten the recovery of the patient.

The doctor should make several examinations, because errors and oversights are thus avoided. He should remember that disease may have existed before injury, that disease may follow injury and yet not be due to it, that the patient may be mistaken and not dishonest, and that hysteria and neurasthenia are common conditions, which may exist with organic lesions without being directly connected therewith.

Corporations liable to be sued would save money by always employing experienced practitioners to examine the injured early, in company with the medical attendant, and by insisting upon at least two such examinations. This procedure would usually get at the truth, often restrain the patient from malingering, sometimes prevent the development of traumatic hysteria or neurasthenia, perhaps scare away scheming lawyers and doctors, and generally restore the patient's health more promptly.

Delay in settlement, too many examinations by various doctors, unwise suggestions of symptoms made by thoughtless examiners, and numerous conferences with lawyers are productive, in many instances, of traumatic neurosis and have unjustly drawn many thousands of dollars from corporation treasuries.

In conclusion, I desire to emphasize two points: First, that an ignorant careless, or injudicious doctor may be the real cause of many cases of traumatic hysteria and neurasthenia; and, secondly, that prompt settlement of damage suits is an inestimable aid in the cure of accidental injuries associated with litigation.—*N. Y. M. J. and P. M. J.*

OUR INCONSISTENT MEDICAL LAWS.

By C. McKane, Ph. D., M. D., Savannah, Georgia.

The term American physician and surgeon is a veritable misnomer. We have carried this matter of state rights so far that we have become a practical joke in the eyes of medical men in every civilized country on the face of the globe. Nearly every state in the union regulates the practice of medicine to suit itself, and no two states are alike in requirements, hence we have the Georgia physician, the New York physic ian, the Ohio physician, etc. The so-called American physician finds himself in a peculiar position, for he cannot practice his profession in every section of his own country unless he pays a fee and subjects himself to a new examination every time he crosses the border of a state. As far as I know this is the only country under the sun where such a condition prevails.

No intelligent, conscientious medical man in this country objects to a high standard of medical education, nor does he object to a higher preliminary training. All will concede the right of the government to supervise, control and direct medical matters, but it should be uniform throughout the entire country. My opinion is that the Federal government should control the licensing of physic ans, and if this connot be done the physicians of the country in the several states should agitate the matter until a system of reciprocity with a uniform standard in preliminary training and general medical proficiency is established. It is a disgrace and an outrage and an insult to the intelligence of the profession in America to longer submit to this farce comedy under the guise of "medical practice acts." We are extremists swinging from one end of the pendulum to the other, at one time no law, at the other too many laws. It cannot be disputed, nor do we wish to deny the fact that there was a time when our standard, or rather lack of standard made the American man (the rank and file) an object of contempt and derision by his better qualified European brother. Upon admission no questions were asked as to qualifications as long as the fee of $5.00 was paid for matriculation and the general ticket with various special fees was forthcoming. Disreputable medical colleges flourished and prospered like the proverbial green bay tree. The attempt to blot out this curse was commendable and worthy, but in doing this we had no moral right to destroy ourselves. The evil could be remedied only by imposing hardships on worthy and well qualified men. It should be remembered that while medical education has been subjected to much abuse in this country, worthy institutions have always existed and worthy men

have been an honor and an ornament to the profession in this country. The profession in America has taught Europe many useful lessons in medicine and surgery, and to American physicians must be ascribed the discovery of ether anæsthesia and modern gynæcological surgery.

The natural and inherent tendency of the American to grasp a new idea and improve upon it has served to illustrate our vast mental capacity, surprised the world and puzzled our professional brethren across the seas. With years of study over black bread and coffee and cheap beer, always a student, straining eyes and brain to discover something, he no sooner announces a discovery before the ingenious "Yankee" has improved upon it and achieved greater and better results, yet the majority of our men were supposed to be inferior in training. In spite of poor training and cheap diplomas many of the earleir physicians did excellent work. There is an idea prevailing among many honorable and deserving medical men that the examining boards keep out quacks, but this is not the case. There are more quacks now doing business in the several states than ever before. These gentlemen grow rich and strong, while the poor "regulars" of all schools can hardly exist.

Our plea is fair play for the regular profession of all schools. Men who have spent years in preparation are entitled by every right of common sense and equity to practice their profession wherever the stars and stripes are unfurled to the breeze. Why not imitate our British cousins and have a law for the entire country? In England, all students, before entering the medical profession, must hold an A. B. from some recognized college or pass a preliminary or registration examination in general education and present to the general medical council a certificate of good moral character. If the candidate is successful in the examination he is registered by the council and five years must he serve in a medical institution recognizced by the government, at the end of which time, if he pass a successful examination, he is allowed to practice anywhere in the British Empire.

Now, if the candidate for medical honors does not possess an A. B. degree he is examined in English, general and special geography, arithmetic, general history, Latin and other subjects that a medical man should have a knowledge of. There are too many medical colleges; they should be fewer in number, and these should be improved. Every one should be placed under the supervision of the federal or state governments with the same requirements for admission and the same standard for graduation. Until this is done the American medical man will be a local factor, with no right in law or equity to assume the title of American physician and surgeon.

Let it not be understood that it is my intention to ridicule honest research and worthy endeayors. I am not criticising those members of our profession who are searching for light and truth in suggestion and hypnotism, but I am convinced that many imposters are sailing under these colors to rob the people and impose on their credulity.—*Medical Era.*

WOUNDS AND THEIR RELATIONS IN MEDICO-LEGAL WORK.

T. Chas. Buxton, M. D.

The object in studying wounds is to determine if possible whether it was accidental or intentional, suicidal or homicidal, and to determine whether it was at the hand of the deceased during an attempt to commit suicide or whether at the hand of another.

If the person is still alive then it is our duty to ascertain whether the wound is serious, trivial or will positively prove fatal.

All wounds are single or multiple, and if multiple it should, if the person is found dead, be a warning to the coroner and examining physician to carefully investigate the cause and try to ascertain whether they are both ante-mortem or post-mortem.

It is a very important factor in determining the presence of lymph, blood, or whether the wound has made an effort at healing by examining for granulations, cicatricial tissue, etc.

Examine the edges and write with pen and ink what you find—the edges are smooth or rough, regular or irregular.

If a sharp instrument has been used the cut will be clean and smooth; if a dull instrument the edges will be more or less ragged and uneven.

If sharp pointed the puncture will give plain evidence; but if dull there will be more or less contusion.

In cases of suicide it would not be likely that the person would inflict a second wound, but this does sometimes happen and care should be used in arriving at the exact direction the instrument came that dealt the blow, as this evidence may be the key to homicide or suicide, determine the direction the instrument came and where it passed, whether if it be a knife or any instrument that cuts or tears, also the kind of blood vessels it severed, venous or arterial; the cause of death might have come about by poisoning. Bruises or contused wounds over the body about the genitals may indicate rape or attempt at the same; if of the throat it indicates garroting.

If a gun-shot wound with homicidal or suicidal intent, will be most likely about the head or chest. Those shots that are at the hands of the persons themselves and about the head are usually the temple (right); occasionally a shot is found in the forehead or mouth that has been delivered by the man's own hand.

A case now before the Ninth Judicial Court is where a man Brown stabbed a Roberts in a row, the knife entering the abdominal cavity about one-half inch to the left of the median line and about one inch above the umbilicus. The wounded man was taken from the state's attorney's office to the Wabash R. R. Hospital; an operation was performed, but the man died inside of five days of peritonitis.

The man Brown is now held for manslaughter.

The testimony that must be rendered in this case will no doubt convict the man of murder in the second degree.

The surgeon must testify as to the exact penetration of the abdominal cavity and whether the knife severed an artery or veins and also enlighten the court as to what danger there is in entering the cavity with a knife that has not been previously sterilized and the skin rendered aseptic; also the danger in an operation in this cavity made by the most skillful, as a man's fate and destiny rests on the exact cause of the death.

An attorney remarked to me this morning, that he wouldn't give a d—n for any doctor's evidence, as they usually get things mixed, and purposely give evidence on both sides for fear some fellow physician might contradict the evidence rendered.

Brother physician, let us make a different record for ourselves than that. Let us tell the truth, it matters not whether it suits the lawyers or not, if there is a shade of doubt in the case, it is better to give it to the accused man than to the lawyers to make sport of, hence render honestly and scientiffically but in terms the jury can understand all evidence that is forced upon us.

Wounds may become poisoned after they have been received—for instance a dog has lacerated the flesh and in a few days the person dies of hydrophobia, or tetanous attacks wound of any part of the body, but more likely the hands and feet, again erysipelas seems naturally prone to attack the face, often a wound.

Circumstances always play a large part in arriving at the true cause of wounds but this is something the physician has nothing to do with.

Stab wounds that would ordinarily prove fatal, such as where the knife enters the perisardium or the heart proper, there would be no doubt as to the intent of the one that struck the blow, but the party did not die, under the skill of the physician the person was saved, but the wound under ordinary circumstances would have been fatal. What will the physician, when brought on the stand and given a hypothetical question of this kind be able to positively affirm? Was the wound fatal or must the man simply be tried for an assault and battery? It rests with you.

The wound was fatal whether the man died or not. The man getting well was due to accident. The physician being handy and nature favoring him with a strong constitution does not prove the unsoundness of the fatality of the wound.

In murder cases the point is raised by the defense that the death came about by medical treatment, and the jury will consider the same. The surgeon is then accused of causing death. But supposing the man has had an artery severed and the surgeon ligates the same, thus saving the man's life; are we to say had the man died it was the surgeon's fault? Is the doctor to be accounted as the helper of crime, or is he to abolish it?

An ancient rule of law.

That where a duty is imposed damages may be recovered for injuries resulting from a breech, "therefore an action may be maintained against medical men revealing professional secrets."

Each state has a right, and each board of health, where a physician

reports smallpox in a community, to expel a child not vaccinated, and will be so for the good of the health of the community. In Pennsylvania the higher courts have passed on such acts tnd confirm ahe decision of the lower court in the following terms: "We think the court did not err" in commenting on a case of expellation brought before it from lower courts.

Peoria justice decided against the physician:

Justice Felter in a decision holds that physician, no matter what his skill, confers no benefits upon a patient by merely standing by and offering his services.

Neither can he collect for walking a block to tender his service.

A test case was brought before him, Drs. Parker and Parker, who brought suit against Samuel Block. In response to a call, Dr. Parker visited Block only to find that a physician already summoned had administered restoratives; nevertheless he presented a bill for his services.

In deciding the case against the doctor the justice said that the case was unique so far as he could discover, and in forming his decision he had been obliged to resort to common sense and custom among practitioners as far as he could discover.

This decision is unjust and should have been carried to a higher court to test its legality. When a physician is called and responds to the call, but on arriving finds the person has been relieved by another physician, it is not the fault of the first, and he shloud be paid a fee, or a nominal fee at least.—*Regular Medical Visitor.*

State Medicine.

Under this head will be published articles relative to the application of medical knowledge to the public welfare. It includes forensic medicine, public hygiene, medical ethics, medical education and military and naval medicine.

Communications, articles and reports from members of state boards of health and boards of registration and examination are requested.

ANOTHER ANTI-VACCINATION LIE NAILED.

A circular issued by the State Board of Health of Michigan, says:

An item has been going the rounds or the press relative to the death of William Taylor, a child at Port Huron, alleging that "The parents believe that his death was caused by vaccination." But an official report to the Secretary of the State Board of Health clearly proves that the alleged belief had no foundation in fact. The report says that a short time after vaccination the chlid was taken sick with bowel trouble and had no medical attendance, the parents being "Christian Scientists." After the death of the child the coroner called in a reputable physician and found the vaccinated arm, aside from a small scar, was exactly the same as the other, and showed no sign of having been inflamed. The physician and the coroner came to the conclusion that the child had died of "enterocolitis"—inflammation of the bowels. It appears that the parents belong to a sect whose members do not belieye in vaccination, nor in calling a physician, and undoubtedly would have been pleased to have had the death recorded as due to vaccination, especially as otherwise there is a suspicion as to the effect of the lack of proper medical attendance for the relief of the inflammation of the bowels—*J. A. M. A.*

TEMPORARILY BLOCKS VACCINATION LAW.

In the District Court at Iowa Falls, November 12, Judge Richards granted a temporary injunction restraining the school board of that city from preventing pupils from attending school unless vaccinated in the manner prescribed by the State Board of Health, thus allowing those treated by the internal method to attend school.—*J. A. M. A.*

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THE MEDICO-LEGAL BULLETIN is issued on the first of each month, in the interests of the medical profession from a Medico-Legal standpoint, and will spare no endeavor to furnish valuable news and information relative to legislative enactments and judicial decisions affecting the profession. Communications on these subjects are solicited from all interested. Reprints of contributed original articles will be furnished, without charge, to authors making request.

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A DEFINITION OF MEDICAL PRACTICE.

Dr. S. D. Van Meter, of Denver, has suggested the following definition of medical practice to be used by legislators intending to debar quacks from attempts to pass themselves off as qualified practitioners: Any person shall be regarded as practicing medicine, within the meaning of this act, who shall in any manner hold himself out to the public as being engaged within this State in the diagnosis and treatment of diseases or injuries of human beings; or who shall suggest, recommend, or prescribe any form of treatment for the intended palliation, relief, or cure of any physical or mental ailment of any person, with the intention of receiving therefor, either directly or indirectly, any fee, gift, or compensation whatsoever; or who shall maintain an office for the reception, examination and treatment of any person suffering from disease or injury of body or mind; or who shall attach the title of M. D., Surgeon, Doctor, or any other word or abbreviation to his name, indicative that such person is engaged in the practice of medicine as hereinbefore defined.

Judicial Decisions.

Under this heading will be presented each month information relative to judicial decisions affecting the medical profession.

THE COURT OF APPEALS UPHOLDS THE VACCINATION LAWS.

The New York State Court of Appeals handed down a decision on the 18th of October which is of exceeding interest to sanitary officers and the public.

Section 210 of the Public Health Law, as amended in 1900, reads as follows:

Sec. 210.—VACCINATION OF SCHOOL CHILDREN:—No child or person not vaccinated shall be admitted or received into any of the public schools of the state, and the trustees or other officers having the charge, management or control of such schools shall cause this provision of law to be enforced. They may adopt a resolution excluding such children and persons not vaccinated from such school until vaccinated, and when any such resolution has been adopted, they shall give at least ten days' notice thereof, by posting copies of the same in at least two public and conspicuous places within the limits of the school government, and shall announce therein that due provision has been made, specifying it, for the vaccination of any child or person of suitable age desiring to attend the school, and whose parents or guardians are unable to procure vaccination for them, or who are by reason of poverty, exempted from taxation in such district.

The case just decided came up from the lower courts on a motion for a peremptory writ of mandamus made by Edwin C. Vilmeister against Patrick J. White, president of the board of education, and F. H. Meade, principal of public school No. 12, in the Borough of Queens, New York City.

The motion for a mandamus was denied with costs.

We quote from Judge Vann, who wrote the opinion, as follows:

The question presented is whether the Legislature is prohibited by the constitution from enacting that such children as have not been vaccinated shall be excluded from the public schools. The appellant claims that the Public Health Law places an unreasonable restriction upon the right of his child to attend school, and that it violates the section of the constitution already quoted, as well as the general guarantees for the protection of the rights, privileges and liberties of the citizen (Cons., art. 1, secs. 1 and 6). The respondents claim that the object and effect of such legislation is the protection of the public health, and that, hence, it is a valid exercise of the police power.

When the sole object and general tendency of legislation is to promote

the public health, there is no invasion of the constitution, even if the enforcement of the law interferes to some extent with liberty or property.

The appellant claims that vaccination does not tend to prevent smallpox, but tends to bring about other diseases, and that it does much harm with no good. It must be conceded that some laymen, both learned and unlearned, and some physicians of great skill and repute, do not believe that vaccination is a preventive of small pox. The common belief, however, is that it has a decided tendency to prevent the spread of this fearful disease and to render it less dangerous to those who contract it. While not accepted by all, it is accepted by the mass of the people, as well as by most members of the medical profession. It has been general in our state and in most civilized nations for generations. It is generally accepted in theory and generally applied in practice, but by the voluntary action of the people, and in obedience to the command of law. Nearly every State of the Union has statutes to encourage or, directly or indirectly, to require vaccination, and this is true of most nations of Europe. It is required in nearly all the armies and navies of the world.

A common belief, like common knowledge, does not require evidence to establish its existence, but may be acted upon without proof by the Legislature and the courts. While the power to take judicial notice is to be exercised with caution and due care taken to see that the subject comes within the limits of common knowledge, still, when according to the memory and conscience of the judge, instructed by recourse to such courses of information as he deems trustworthy, the matter is clearly within those limits, the power may be exercised by treating the fact as proved without allegation or proof.

The fact that the belief is not universal is not controlling, for there is scarcely any belief that is accepted by everyone. The possibility that the belief may be wrong, and that science may yet show it to be wrong, is not conclusive, for the Legislature has the right to pass laws which, according to the common belief of the people are adapted to prevent the spread of contagious diseases. In a free country where the government is by the people through their chosen representatives, practical legislation admits of no other standard for action; for what the people believe is for the common welfare must be accepted as tending to promote the common welfare, whether it does in fact or not. Any other basis would conflict with the spirit of the constitution and would sanction measures opposed to a republican form of government.

While we do not decide, and can not decide that vaccination is a preventive of smallpox, we take judicial notice of the fact that this is the common belief of the people of the State, and with this fact as a foundation we hold that the statute in question is a health law, enacted in a reasonable and proper exercise of the police power. It operates impartially upon all children in the public schools and is designed not only for their protection, but for the protection of all the people of the State. The relator's son is excluded from school only until he complies with the law passed to protect the health of all, himself and his family included. No right conferred or secured by the constitution was violated by that law or by the action of the school authorities based thereon.

Cullen, Ch.J.; O'Brien, Haight, Martin and Werner, JJ., concurred in the opinion as written by Judge Vann.—*Med. Review of Reviews.*

CRITICISMS OF QUESTIONS FOR MEDICAL EXPERTS.

The Court of Errors and Appeals of New Jersey says that, in the malpractice case of Shoemaker vs. Elmer, where it awarded a new trial, after judgment for the defendant, the only assignments of error of importance related to the admission in evidence, over objection, of three questions propounded to the expert medical witnesses called by the defendant. One question was: "Now, from the statement made by Dr. Elmer as to what the patient said to him as to the cause of the injury, what he said he did in discovering what the injury was, and the treatment as testified to by him, was what he did to discover the cause of the injury and his treatment in conformity with or a departure from the rules of practice of the medical profession?" Another question was: "From the statement as made by the defendant in your hearing as to the plaintiff's statement of the cause of the injury, and his (the defendant's) statement as to what he did to determine the injury and what he did in the treatment of it, was there any want of skill or bad treatment, or malpractice by the defendant?" The court thinks each of these questions inadmiissible. It says that they were clearly objectionable, even under the cases relied on by the defendant to sustain them. Neither of these two questions was limited to, or solely predicated on, the statements made by the defendant in his testimony in the cause. The first question was broad enough to permit the expert to base his reply solely on facts which he might have learned from the defendant off the witness stand, or on those he might have heard from testify to in the cause at the trial, or both. The second question was also broad enough to permit the witness to base his reply either in whole or in part, at his pleasure, on facts derived from the defendant's statements made as a witness or otherwise. Neither of these questions needed further comment. There is no rule of evidence governing the admission of expert testimony which could make these questions thus framed admissible. The third question was somewhat more restricted. It was: "Doctor, from the symptoms and the particulars of the plaintiff's condition and the treatment by the defendant, as testified to by the defendant, do you see any evidence of bad treatment of malpractice, according to the rules laid down in practice by the medical faculty?" To sustain the admissibility of this question, Twombly vs. Leach, 11 Cush. (Mass.) 397, was cited. The court says that case did appear to give support to the admissibility of this question; but it does not commend itself to the court's judgment, and is clearly unsupported by authority. This question was a hypothetical one. It was asked of an expert who was expressing an opinion on facts testified to by another person. The question was so framed that it was not possible to tell which of the facts testified to by the defendant must be taken by the witness as the basis of his opinion. The question permitted the witness to determine what part of the defendant's evidence he would adopt and which refect in reaching his conclusion. It afforded

the opposing party no opportunity to object to the assumptions of fact on which the opinlon of the witness was asked. Expert evidence should be carefully guarded. It is sufficiently dangerous when carefully circumscribed. It becomes altogether too unreliable when the basis of it is indefinite. The question on which the opinion is expressed should be so clear that the jury will not be left in any doubt about what the actual facts are on which the witness is expressing an opinion. A question should not be so framed as to permit the witness to roam through the evidence for himself, and gather the facts as he may consider them to be proved, and then state his conclusion concerning them. An attempt was made, and the court says it was supoprted by some authority, to differentiate where the testimony used or the basis of the question is the testimony of but a single witness and is uncontradictory. But the court states that it is unable to see why that should be so. Whether it is contradictory, or involves a different interpretation by different minds, is always problematical. For the expert to remember all the material facts testified to by a single witness, which are to be the basis of his opinion, may be as difficult as to call to mind all the material facts testified to by several witnesses. There should be no loosening of the rule as to the admissibility of this class of evidence. It is undoubtedly very important evidence in many cases, when given strictly within the rule, and its usefulness should not be impaired by raising a doubt as to just what force such evidence should have in the cause. The jury, to estimate properly the opinion expressed, should have the means of showing exactly on what the opinion is based. This court agrees with the view that a medical witness, who has been present during the whole trial and heard all the evidence, should not be permitted to express an opinion on the evidence as heard by him, but that his testimony should nevertheless be taken on a hypothetical question, stating the facts claimed to be established and which are too form the basis of his opinion.

PRIVILEGED COMMUNICATIONS TO PHYSICIANS.

Battis *v.* Chicago, etc., R. Co., (Iowa 1904) 100 N. W. Rep. 543, decides a rather interesting point on the subject of privileged communications. Iowa Code, 4608, provides that no practicing physician shall be allowed to disclose any confidential communication properly intrusted to him in his professional capacity and necessary and proper to enable him to discharge the functions of his office. The plaintiff in this case was injured by being ejected from one of the defendant's trains, and the defendant's local physician was summoned to attend him, not by the plaintiff, but by an agent of the defendant, and the sole purpose of the summons was that, for the benefit of the defendant, the physician might ascertain the plaintiff's condition. It was held that notwithstanding the above facts the physician could not be allowed to testify as to what the plaintiff had said in regard to his injuries.

IS IT HERESY FOR AN EDDYITE TO HAVE SUPERFLUOUS HAIR REMOVED?

The Supreme Court of Michigan says of the case of Meyer vs. Knott that it was novel (not to say unique). The defendant was a teacher of Eddyism, and was in February, 1901, first reader orf the First Church of Christ, Scientist, of the city of Detroit. The declaration alleged that February 14, 1901, the defendant falsely represented to said plaintiff that she (the defendant) was then a conscientious believer in and practicer of the principles of "Christian Science," and "mentally and morally qualified and competent to give class instruction in Christian Science mind healing"; that the plaintiff agreed to pay and did pay the defendant $100 for instruction, which was given; that by reason of the defendant not being a sincere and faithful believer in and practicer of Christian Science, the plaintiff received no benefit from the instruction given him, wherefor he sought to recover the money paid and compensation for the time spent in the attempt to learn to "cure disease through the power of Christian Science mind healing." On the trial it appeared that the defendant had, two or three years prior to the contract with the plaintiff, had superfluous hair removed from her face by a physician by electrical treatment, and, as the plaintiff was able to call medical experts who testified that the superfluous hair was known to pathology by the name of "hypertrichosis," and was a disease, and as Eddyism is opposed to material treatment for disease, the Supreme Court says that it follows that one who has superfluous hair removed is not a true believer in, and adherent and practicer of, the principles of Eddyism. But the court goes on to say that, apart from the consideration that this departure from the true faith, if it be such, occurred two years before the contract with the plaintiff, thus leaving ample time for the defendant to mature her belief, the court deems it sufficient answer to the plaintiff's contention that, if it be conceded that superfluous hair is a disease, it is also regarded by many as a facial blemish. Some conceal it as well as they may by the use of face powder; some have it removed. The defendant, because her little son teased her about the appearance of this superfluous hair, caused hers to be removed. This was not done as a treatment for disease, but as a means of making herself more presentable. The court thinks this did not tend to show that the defendant was guilty of fraud in holding herself out as a teacher of Eddyism. The court takes pains to add that it is to be understood that both the plaintiff and the defendant proceeded on the theory that Eddyism, as taught by Mrs. Eddy's book, "Science and Health," is true, and that it had therefore determined the case on that assumption. (Judgment for defendant was affirmed).—*J. A. M. A.*

ESPECIALLY SKILLFUL DIAGNOSIS.

The Pennsylvania Superior Court has held that in a case of a general practitioner treating diseases of the eye, the physician can not be held for damages for diagnosing and treating glaucoma as conjunctivitis, on the ground that this might occur when the physician exercised ordinary skill and care, glaucoma being a very rare disease. (Wohlert v. Siebert, 23 Pa. Supr. Ct., 213.) The court further decided that not only must carelessness or unusual lack of skillfulness be shown, but it must also be proven that injury was received from such unskillfulness, if the patient would recover damages.—*Chicago C. and P. M. J.*

SUFFICIENT EVIDENCE OF EMPLOYMENT OF PHYSICIAN.

The Supreme Court of California affirms, in a case of Scott vs. the Superior Sunset Oil Company, a judgment for $1,200 for several surgical operations and some 61 days' attendance on an employe of the company who was shot through the knee and through the lung while protecting its land against jumpers. A majority of the company's board of directors, including both a director who was its secretary and treasurer, and the vice-president, actively participated in employing the physician and counseling with him concerning the care and treatment of the patient, all of which was done avowedly on behalf of the company. This, it is held, was sufficient to charge the corporation. It was not necessary that the employment should be made or ratified by action of the board at a regular meeting. The separate assent of a majority of the board was all that ought to be required under the circumstances presented by the evidence. Furthermore, there was no error, it is held, in admitting evidence of the knowledge of the directors in regard to the employment of the physician by its secretray, acting for the company. Such evidence was clearly proper when coupled with evidence of the express assent to the employment by a majority of the board.—*J. A. M. A.*

DECISION IN RE OSTEOPATH.

The secretary of the State Board of Health of California, states that an osteopath can not sign a death certificate, and gives as his authority Attorney-General Webb, who cited with his approval the decision of former Attorney-General Tirey L. Ford, who said:

I conclude that an osteopathist is not a physician within the meaning of Section 3084 of the Political Code, or the municipal corporation act, so called, hereinabove referred to, and that he can not, therefore, sign a death certificate as a physician as the word is used in the statutes.—*J. A. M. A.*

PHYSICAL EXAMINATIONS BY JURORS.

In Garvik vs. Burlington, etc., R. Co., (Iowa 1904) 100 N. W. Rep. 498, the Supreme Court of Iowa held that in a civili action against a railroad company to recover damages for a rape alleged to have been committed by a brakeman upon a female passenger, it was error to allow the jurors to make an examination of the brakeman's person to ascertain whether he was physically capable of the alleged act. The holding was based on two grounds: First, because the question in issue was the brakeman's ability at the time the act was alleged to have been committed, and there was no showing that he was in the same condition then as at the time as the examination; secondly, because the examination was indecent. On the second point much stress was laid, the court remarking: "Let it be said, once for all, that we cannot lend our support to such a shocking and indecent performance." It was held that the evidence was not demonstrative in character, and that "authority to view the premises which obtains in a certain class of cases will not sustain the procedure adopted in this case."

RESPONSILITY FOR FAILURE IN DIAGNOSIS.

The Supreme Court of Kansas (Manser vs. Collins, 76, P. 851), has decided that a physician is answerable for a failure to discover a serious dislocation of the patient's shoulder and fracture of the arm, when there was reasonable opportunity for examination and when the diagnosis could have been made by exercise of reasonable care.

POWER OF BOARDS OF HEALTH TO CONTROL BARBER SHOPS.

The Supreme Court of New Jersey has decided that the statutory provisions giving the Board of Health general supervision of public health is ample authority to control barber shops to prevent the spread of contagious skin disease (LaPorta vs. Board of Healtuh of Hoboken, 58 A., 115).

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JANUARY, 1905

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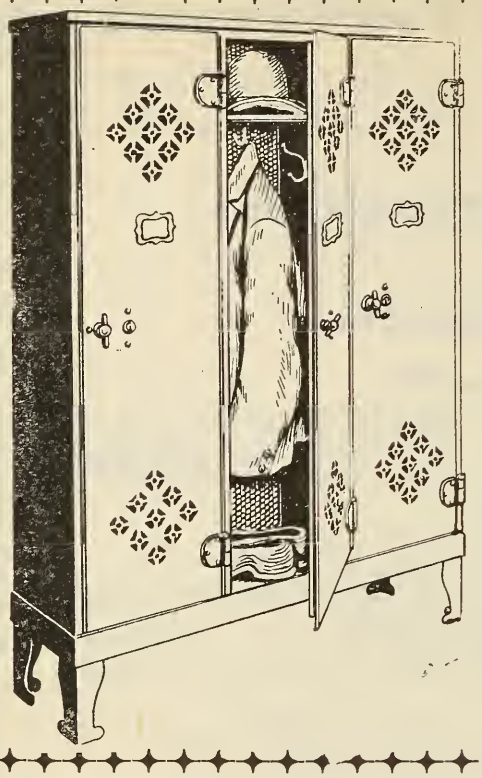

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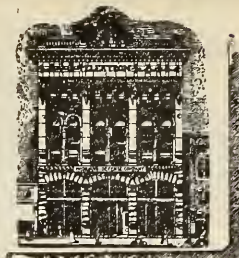

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Immediate notice by telegram, must be given the company at the Home Office at Fort Wayne, Ind., of any suit brought or demand made, and the holder hereof shall immediately forward the summons, or other process served, and the complaint or petition filed, together with a full and complete history of the case and services rendered.

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No suit or claim will be defended by this company, under this contract, in which the cause of action arose previous to the date of this contract.

This contract does not cover criminal prosecutions nor suits for assault, criminal abortion, foeticide, homicide or other criminal act, or actions arising by way of counter-claim or recoupment.

The company may cancel at any time the unexpired portion of this contract upon written notice mailed to the holder hereof, and the unearned portion of the consideration therefor, shall be returned to the holder hereof.

This contract does not take effect until the consideration therefor shall have actually been paid to the company or its authorized agent, but if the holder shall have paid such consideration and shall have received from the company or its duly authorized agent a memorandum certifying such payment and that the contract is to be subsequently delivered, then this contract shall be dated as of the date of such payment and shall be in force and effect from that date.

This contract shall not lapse at the end of the time as stated above if the holder hereof shall pay the annual consideration in advance at the Home Office in Fort Wayne, Ind., or to an authorized agent of the company, in exchange for the company's receipt, signed by the president and secretary and countersigned by the agent, but shall continue in force for the term or terms for which such annual consideration shall be paid; provided, however, that the liability of the company under such extension shall not be cumulative.

No consideration or agreement contained in this contract, or application for same, can be waived or altered in any manner by any person, other than the president or secretary, in writing endorsed hereon.

In Witness Whereof, The Physicians Defense Company has caused this contract to be signed by its president and secretary and its official seal attached hereto in Fort Wayne, Indiana, this _____ day of _____ 190__.

Miles G. Porter
President.

_____
Secretary.

Medico-Legal Bulletin.

ORIGINAL ARTICLES

COMPULSORY VACCINATION.

That it is a valid exercise of the power of police regulation to require vaccination as a condition precedent to the right to attend school seems to have been settled in this country by a uniform course of decisions. As the United States Supreme Court said in Lawton vs. Steele, (152 U. S. 136): "The extent and limits of what is known as the police power have been a fruitful subject of discussion in the Appellate Courts of nearly every state in the Union. It is universally conceded to include everything essential to the public safety, health and morals, and to justify the destruction or abatement by summary proceedings of whatever may be regarded as a public nuisance. Under this power it has been held that the state may order . . . the compulsory vaccination of children." The earliest case directly in pointis that of Abeel **vs. Clark** 84(Cal. 226) decided in 1890. Similar decisions were handed down in Pennsylvania and in Connecticut in 1894 (Duffield vs. Williamsport School District, 162 Pa. St. 476; Bissell vs. Davidson, 65 Conn. 183); in Missouri in 1895 (In re Rebanec, 62 Mo. App. 8); and in Indiana in 1900 (Blue vs. Beach, 155 Ind. 121). The latest case is that of Viemeister vs. White, decided by the Court of Appeals of New York on October 18, 1904, and not yet officially reported. An earlier decision in New York to the same effect is Matter of Walters, 84 Hun 457, rendered by the General Term of the Supreme Court, Second Department, in 1895. In Illinois and Wisconsin it has been held that in the absence of express authority from the legislature a rule of the State Board of Health requiring the vaccination of children as a prerequisite to their attending the public schools is unreasonable when smallpox does not exist in the community and there is no reasonable ground to apprehend its appearance (Potts vs. Breen, 167 I.ll 67; Lawbough vs. Board of Education, 177 Ill. 572; State vs. Burdge, 95 Wis. 390). In these three cases, however, the right of the legislature to confer such authority is not directly denied.

The question which naturally arises from a consideration of these holdings is whether they have not surely paved the way for future

declarations in favor of the right of the legislature to order the compulsory vaccination of all persons, adults as well as children According to the Encyclopædia Brittanica, "vaccination has been compulsory in England since 1854, and the last act upon the subject, passed in 1898, requires every child born in England to be vaccinated within six months of its birth. It became compulsory in Bavaria in 1827; Denmark, 1810; Sweden, 1814; Wurtemberg, Hesse, and other German States, 1818; Prussia, 1835; Roumania, 1874; Hungary, 1876; and Servia, 1881. It is aided, encouraged, and to some extent compelled in the other European nations." It is worthy of note that these countries are not, as a general rule, hampered in the matter of legislation by the existence of written constitutions, and this may be the real reason why so few of our American jurisdictions have thought it safe to enact laws compelling general vaccination. But in at least two States where such laws have been enacted they have been upheld. In Georgia it has been held that the legislature may, in the exercise of the police power, confer upon the municipal corporations of the State authority to make and enforce ordinances requiring all persons who may be within the limits of such corporations to submit to vaccination whenever an epidemic of smallpox is existing or may be reasonably apprehended (Morris v. Columbus, 102 Ga. 792). In North Carolina an act providing that "the authorities of any city or town, or the board of county commissioners of any county, may make such regulations and provisions for the vaccination of its inhabitants under the direction of the local or county board of health or a committee chosen for the purpose, and impose such penalties as they deem necessary to protect the public health," has been held constitutional (State v. Hay, 126 N. Car. 999). These two cases seem to be the only ones reported where the question of the validity of compulsory vaccination statutes has been determined in the highest courts, and unless the decisions first above mentioned may be taken as authority on the general proposition, the right to compel the vaccination of all citizens in a State or community must be considered as upheld in two jurisdictions alone.

Any requirement of law, to be sustained as a valid exercise of the police power, must be a reasonable requirement. Is the requirement of vaccination reasonable? If it were an established fact that a vaccinated person is immune against smallpox there could be no question of the reasonableness of a law requiring vaccination as a preventive of the spread of so dangerous a disease. But it is interesting to note that in no one of the cases does the court so declare. In Abeel v. Clark (supra) the language of the court is: "While vaccination may not be the best and safest preventive possible, experience and observation, the test of the value off such discoveries, dating from the year 1769, when Jenner disclosed it to the world, have proved it to be the best method known to

medical science to lesseen the liability ot infection with the disease." In Duffield v. Williamsport School District (supra) it is said: "Vaccination may be, or may not be, a preventive of smallpox. That is a question about which medical men differ and which the law affords no means of determining in a summary manner. A decided majority of the medical profession believe in its efficacy. The municipal regulations of many, and I have no doubt of most, of the cities of this Statee and country provide for it. In the present state of medical knowledge and public opinion upon this subject it would be impossible for a court to deny that there is reason for believing in the importance of vaccination as a means of protection from the scourge of smallpox. The question is not one of science in a case like the present. We are not required to determine judicially whether the public belief in the efficacy of vaccination is absolutely right or not. We are to consider what is reasonable in view of the present state of medical knowledge and the concurring opinions of the various boards and officers charged with the care of the public health." In Bissell v. Davison (supra) the court says: "If vaccination is a preventive of smallpox, as claimed by what appears to be the great majority of the medical profession, the requirement would seem to be a reasonable one. Public opinion also upon this question, as crystallized into law, seems to regard it as such a preventive. It is a question, however, about which medical men differ greatly, and upon which public opinion at the present day may be said to be divided. However this may be, we think that in a case like the one at bar, touching the terms and conditions of attendance at the public schools, the question of the reasonableness in this sense of such a requirement is one exclusively for the legislature." In Matter of Rebenack (supra) the court says: "The only question, therefore, is whether the requirement of vaccination is a reasonable requirement to prevent transmission of a contagious disease. We are aware that different views exist among medical experts as to the merits of vaccination, but it can not be gainsaid that the great majority of them recommend it as a meritorious preventive. That opinion is sufficiently prevalent in all civiilzed communities to have found recognition in the legislation of several States." In Blue v. Beach (supra) the court dodges the question as follows: "With the wisdom or policy of vaccination, or as to whether it is or is not a preventive of the disease of smallpox, courts, in the decision of cases like the one at bar, have no concern. It is a question, it is true, about which eminent medical men differ, a large majority of whom, however, affirm that it serves as a preventive of or a protection against this dread scourge, which Macaulay denominated 'the most terrible of all ministers of death.' The question is one which the legislature or boards of health, in the exercise of the powers conferred upon them, must in the first instance determine, as the law affords no means for the question to be subjected to a judiciary inquiry or determination." Similarly, in

Morris v. Columbus (supra) the court declares: "With the wisdom or policy of vaccination the courts have nothing to do. We do not propose to enter into a discussion as to whether or not it is a preventive of smallpox. That question is not proper subject-matter for review by the courts. The legislature has seen fit to adopt the opinion of those scientists who insist that it is efficacious, and this is conclusive upon us. Our only province is to see that none of the rights guaranteed to the plaintiffs in error by the fundamental law are infringed." In the recent New York case (supra) the court says: "While we do not decide and cannot decide that vaccination is a preventive of smallpox, we take judicial notice of the fact that this is the common belief of the people of the State, and with this fact as a foundation we hold that the statute in question is a health law, enacted in a reasonable and proper exercise of the police power." In State vs. Hay (supra) it is said: "Statistics taken by govenrmental authority show that while 400 out of every 1,000 unvaccinated persons exposed to the contagion are attacked by it, less than two in 1,000 take the disease when protected by vaccination within a reasonable period. There are those, notwithstanding these well-ascertained facts, who deny the efficacy of vaccination, as there are always some who will deny any other result of human experience, however well established, but the legislature, acting in their best judgment for the public welfare upon the information before them, has deemed vaccination necessary for public protection, and their decision, being within the scope of their functions, must stand until repealed by the same power." In the case of Hazen vs. Strong, 2 Vt 427, the court held that the municipal authorities of a certain town in Vermont had authority, under a general legislative power, to take the most prudent measures to prevent the spread of smallpox, to levy and collect a tax for the purpose of defraying the expenses of having the inhabitants inoculated with the "kine-pox," the court saying: "Experience fully evinces the eminent utility of the kine-pox in saving expense, as well as placing a safeguard around each individual, to protect life and health, while all attend to their usual avocations, instead of being confined with a loathsome disease or becoming unrses to those who are thus confined. We are, therefore, disposed to support the selectmen and the town in this measure to prevent the spreading of the disease when circumstances render any measures necessary." In Potts vs. Breen (supra) the court says: "We are not called upon to consider whether or not vaccination is a preventative, or the best known preventative of smallpox. That it is so seems to be the consensus of opinion of a learned and honorable profession, borne out by the history of its use for a century, and we can only so regard it."

It seems then that the efficacy of vaccination is regarded by the courts not as an established fact, but rather as a popular belief of which the courts will take judicial notice. But if a mere popular belief is sufficient to uphold a police regulation for one purpose, why not for another? If vaccination is a reasonable requirement as a condition precedent to the right to attend school, why is it not also a reasonable requirement as a condition precedent to the right to live in a community? In other words, if the legislature can say that no child can attend school unless he has been vaccinated, why can it not also say that no person shall reside within certain corporate limits

unless he shall have been vaccinated? This point was strongly urged in the Georgia case (supra), where a compulsory vaccination law was upheld, in the following language: "There are several cases holding that acts of the legislature authorizing school boards to require vaccination as a condition precedent to admission to the public schools are not an invasion of any constitutional right of the pupil. Pupils of schools constitute a general class of persons. If the legislature can authorize the imposition of this condition upon one class, why not upon another? If it can say that the penalty for refusing to be vaccinated must be a denial of the pupil's right or privilege to attend school, why can it not say to another general class, the penalty for your refusal to submit to vaccination shall be a fine or imprisonment? If the act can be upheld in the one case as constitutional, why not in the other? True, in the school cases the pupils may remain out of school; but unless vaccination is itself lawful, what right has a school board to deny admission to the schools until this unlawful regulation is complied with? The school boards have no right to pass such a regulation unless the power is specifically conferred upon them by the legislature; and ought a condition precedent to compliance with an unconstitutional law be upheld? Can the cases be justified on any other theory than that the law itself is not unconstitutional? True, the child may avoid the consequences of the resolution by not entering school; and so the citizen may avoid the consequences of a municipal regulation by putting himself beyond the jurisdiction of the municipality. Indeed, this is a very effectual way of avoiding the consequences incident to a failure to comply with any law. Suppose the courts were to declare the act now under consideration repugnant to the constitution, would it be contended for a moment that the legislature could confer the same authority on a school board? Is there any good reason in law for the discrimination? There can be no legal reason for refusing to allow a child to invoke a law to secure him in his right or privilege, whichever it may be termed, to attend a public school, which a citizen might rely on to secure him a residence in a given place. It seems to us, therefore, to be a necessary conclusion from the cases cited supra, holding a regulation requiring vaccination of pupils as a condition precedent to admission in the public schools reasonable and constitutional, that the act now under consideration is a valid exercise of the police power." This conclusion is one the force of wihch cannot be denied. And it is therefore probable that the courts in any of the above mentioned jurisdictions would be compelled, as a logical consequence of their own prior decisions, to uphold compulsory vaccination even though, as has been suggested, the forcible vaccination of a person against his will may be technically an assault.

A decidedly novel question in this connection was suggested in Matter of Walters (supra). The State of New York has a statute providing for the compulsory attendance of children at the public schools. Construing this statute in connection with the provisions of the Public Health Law relative to vaccination, cannot the authorities compel a child within the school ages to be vaccinated? Such a child may be obliged to attend school, but he cannot attend school unless vaccinated. Cannot the school officers therefore vaccinate him forcibly in order that he may comply with the compulsory attendance statute? If so, compulsory vaccination exists in New Nork State, at least as regards school children. And there may be others State where the same conditions of legislative enactment exist.—*Law Notes*.

THE RAILWAY HOSPITAL. ITS IMPORTANCE TO A GREAT RAILWAY SYSTEM.

By Clark Bell, Esq., L. L. D.

The growth of railways in America from its beginning at the end of the first third of the last century, has been by far the most important element in the development of the vast resources of our country, and it has led the whole world in the progress of civilization. American railways have been the object lessons for all mankind. The ocean and the river, the natural, and the canal, the artificial, were the only means that mankind had utilized for transportation of the products of the soil or of the mine, until about the time of my birth, and the vast influence of the railwey in the development of not alone our continent, but all parts of the globe, is beyond computation.

Notwithstanding the enormous mileage of railways on the North American Continent which equals, and perhaps exceeds, that of all the nations of the world combined, we are not at the end of railway evolution and development by any means; and we commence the new century with a larger experience, higher aims, and a better appreciation of conditions than at any period of our history. We are not only the pioneers of railway progress for the race, but we must hold the leadership of its evolution in the wondrous changes that are before us in the coming century.

Among the elements that bear a close relation to the railway of the future is the necessity, the importance and the utility of the railway hospital, and its humane, its beneficent and its great economic results.

The tendency of our era is the consolidation and the unification of railway interests into those great systems which now exist, and which are shortly to be created because of the economic results attained in the administration and operation of the lines. Three great forces are interested in the consideration of the problems which this subject presents:

1. The stockholders of the railways and the boards of management and direction which operate these roads.

2. The people at large for whose benefit they are constructed and operated, and

3. The great and constantly increasing army of men, which may be classed as the employees, who do the actual work for their operation, maintenance and construction.

DAMAGE CLAIMS ON RAILWAYS.

One of the broadest questions of railway management is of necessity, and must ever be, the intelligent management of the question of compensation for injuries to

a. The general public, who are the passengers upon the trains, and

b. The employees, who unfortunately are the victims of accidental injuries in railway operation in a larger proportion than we should expect.

It ought not to be necessary to submit an argument to establish the

proposition that a great railway system, with its resources and capital could erect and maintain in all respects a better hospital for the care of the injured, than any private charitable organization could possibly do. We must assume this to be so. The question to be discussed by the railway manager who is a trustee for the stockholders, is its economy, its necessity and its utility, measured by its results in the diminution of the large sums the system pays each year in damage cases.

I do not deem it necessary here to give details of the economic results on those lines and systems which maintain their own hospitals (of which I have made careful studies) and those who do not. I wish to emphasize and lay great stress upon the statement that the savings of a railway system that maintains its own hosspitals over those who do not, are something enormous.

Let the report of such an experienced obresver as Chief Surgeon W. B. Outten, of the Missouri Pacific System, Chief Surgeon John J. Buckley, of the Northern Pacific Railway System, be taken, and the proposition will be at once conceded to be established.

The labors of the Section on Railway Surgery of the Medico-Legal Society have been largely directed for some years to bring this subject forcibly before the great railway systems of the east.

Chief Surgeon W. B. Outten, a former chairman of that section and Chief Surgeon of the Missouri Pacific Railway System, with myself, met Chauncy M. Depew when he was president of the New York Central Railway, and presented the details and merits of the hospital system to that railway, where it is needed perhaps more than on any other line, or as much as on any eastern system.

Mr. J. Pierpont Morgan, of that direction, who has one of the broadest minds in railway management, and was a member of the board of that system to whom the writer had presented the subject, concurred in its economy and utility.

The Erie Railway System, with which your organization is so closely identified, needs to consider this question.

Unlike the New York Central, the managers of the Erie are not in as close touch with the stockholders, by reasons which are apparent to you all, and could not as easily introduce radical changes as could the New York Central Board. But it is a live question for the Erie System, and indeed for every railway system.

I have not the time nor space to discuss the question on its humane, as well as its economic side, in its enormous good to the employee. I can only say that an examination of the systems that have adopted it, and notably the Missouri Pacific Railway System, will show that the benefit is highly appreciated by the men, and that the small sums each man contributes most cherrfully and willingly, form a most important element in the economic features of its administration.

The system introduced and maintained by the Pennsylvania Railway for the benefit of its employees, is worthy the careful consideration of managers on all the railways.

The greatest economy of the hour, the greatest need of the hour in railway management, as it seems to me, on purely financial lines, is the introduction in every great railway system of a complete and perfectly equipped hospital service, with proper hospitals, under the charge of a chief surgeon and a thoroughly equipped staff of local surgeons along the line.—*Inter. Jour. of Sucgery.*

DISPOSING OF THE DEAD.

How to dispose of the dead with the least danger to the living, while at the same time paying proper respect to the feelings of the relative of the dead person, is a matter which is attracting more attention and causing more discussion every year. It is generally acknowldged that the interment of thousands of dead bodies, many of them reeking with the germs of contagious diseases, in and around crowded cities, is a menace to public health, The New York State Embalmers' Association, through its president suggested the enactment of a law forbidding the burial at sea of persons who die on shipboard. They would not only insist on bringing another source of disease to be planted in some burying ground near a populous centre, but would insist on the bodies being retained on shipboard for several days, to the manifest danger of all the passengers on board. It is true that such a law would probably increase the sale of embalming fluid to the steamship lines and would give the undertakers a little additional business, but aside from those considerations there seems to be no argument in favor of such a law.

The fact is that public opinion must be educated up to the point when the idea heretofore advocated by this Journal will be accepted. That is a compulsory post-mortem in all cases, and incineration of the body. The two go together. The post-mortem is necessary to protect the public from criminals, who would take advantage of the cremation law to get rid of the evidences of their crime. The cremation is necessary to protect the public from contagion.

The only objection to the plan is based on sentimental grounds. It is in that direction that the people must be educated. They must be taught to see that the idea of cremation, so far from being a frightful one, is agreeable to the highest form of thought. There is nothing so cleansing and purifying as fire. All impurities, all disease germs, all the horrors of dissolution and decay, are done away with. In place of a decaying, rotting mass of flesh, buried in the ground, the relatives have the thought of the ashes, purified, cleansed of all the grosser part of the human frame, enclosed in an air-tight casket and placed in a niche in some church, where the enclos-

ing tablet can be seen at all times. The thought on which the sentimental writers so love to dwell of the winds and storms beating on the resting place of the dear departed will, it is true, be no longer ayailable, but the world can very well get along without those touching periods in its sentimental reasoning.

It is true that the cemetery companieswill ceàse to derive a revenue from the sorrows of the world, but that is not an irreparable evil. It will be counterbalanced by the good done in giving a revenue to the churches, in the sale and rental of niches. Instead of buying a lot in a burying ground, which after the first two years is generally left neglected, the family will buy or rent a niche in the church at which they worship. For those who do not go to church, the crematories will supply the places of deposit for the urns. One great advantage of the cremation plan will be that a family removing from one city to another will not have to leave the graves of those they loved behind. The urns containing the purified ashes can be taken along and deposited, either in one of the vaults of the crematories or in a niche in a church. In this country, where there is such a constant shifting and changing of population, this is a consideration which should have weight. There is many a mother who leaves her heart behind her in some churchyard when business or other considerations necessitate a move to a new locality.

Another consideration is that all funeral services can be conducted indoors. During certain months in the year there is hardly a funeral which does not cause the the sickness which supplies the corpses for from one to half a dozen more burials. People go in close carriages to the cemetery. They get out and stand around on the damp earth, the men with heads uncovered, often in a rain or in an atmosphere laden with moisture and so cold that all the attendants, including the minister, are chilled before the ceremonies are completedd. On grounds of public and private health, of economy, of convenience and chiefly on sentimental grounds, incineration is the only proper method of disposing of the dead.

The preliminary post mortem will be a preventive of crime and a benefit to science. No prisoner will dare adminisster a fatal dose when he knows that the compulsory post-mortem will disclose his crime. It will be a benefit to science, as it will correct mistakes in false diagnosis and prevent similar mistakes in the future. There are many diseases in which the symptoms are so obscure that such mistakes do and most constantly occur. By the additional information thus obtained, protection is given to the living. Anything that aids in a correct diagnosis at an early stage of a disease is a distinct benefit. It enables the physician to prescribe the remedy at a time when it will do the most good.—*Medico–Chirurgical Jour.*

State Medicine.

Under this head will be published articles relative to the application of medical knowledge to the public welfare. It includes forensic medicine, public hygiene, medical ethics, medical education and military and naval medicine.

Communications, articles and reports from members of state boards of health and boards of registration and examination are requested.

LIABILITY OF COUNTIES IN ILLINOIS FOR CARE OF INDIGENT PATIENTS.

1. Counties must give or cause to be given such assistance—medical attendance, nursing, provisions, fuel, etc.—to any patient falling sick within the county and unable to pay for such service himself. 2. The county does not have to pay for other than emergency service or emergency supplies, unless such services or supplies are specifically ordered by proper county officials, unless such service and supplies are refused or supplying them neglected, after their necessity has been pointed out. 3. Cities and towns can not hold the county for pay for medical services ordered by town or city, unless county officials have authorized the employment of such services. Cities and towns usually have no right to employ physicians for special service. 4. The expense of enforcing health ordinances and quarantine falls on the city or town—not the county. In counties not under township organization, expense of quarantine falls on county, execpt in incorporated towns and villages. A township is not responsible for such expenses incurred within an incorporated city or village. 5. A county is not liable for the expense of care of a patient quarantined in his own home who has sufficient means to care for himself. 6. A decision as to the amount to be allowed a physician for the care of smallpox cases, made by County Supervisors, is not final. The supervisors are not authorizced or empowered to determine the amount of "reasonable fees"—they do not constitute a court trying a case.—(Abstract from a letter from the secretary of the Illinois State Board of Health to the physicians of the state.)—*Chicago C. and P. W. Jour.*

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ALL SUITS WON IN 1904—WHY?

It may be interesting to those of the medical profession who have cast their fortunes with the Physicians Defense Company to know that this company has never failed to secure a verdict for the physician whom it has defended. On its face this statement might smack of falsehood. We mean, however, exactly what we say, that during the existence of the Physicians Defense Company it has entered upon the defense of numerous suits on behalf of its contract holders, and in not a single instance has an adverse verdict been rendered. Most of these suits have been tried in court and resulted in a verdict for the defendant; many of them have been dismissed for want of prosecution or on motion of the plaintiff; many others have never been allowed to go to the jury.

The Company has on file many threats against its contract holders. The Legal Department of the Physicians Defense Company has recently sent out letters inquiring as to the status of all these threats and in 90 per cent of the cases we have been notified that it was the opinion of the physician who was threatened that no further efforts would be made on the part of the proposed plaintiff to bring the suit. The Company also claims credit in this regard from the fact that as soon as one of its contract holders is threatened with a suit the Legal Department issues letters to the proposed plaintiff advising him that the physician is a contract holder of the Company and just what the Company proposes to do in case suit is filed. These services are not alone confined

to suits for which the Company would, if they were brought, be liable. But the Company extends this aid to the physician who has recently purchased a contract but which does not cover the period in which the services which would be the foundation of the suit were rendered.

The Company has always laid special stress upon the fact that it would not pay any judgment rendered against its contract holders or give anything by way off compromise. When the proposed plaintiff and his lawyer are advised of this fact they are inclined to drop the matter because they can only see a hard fight ahead. These results when contrasted to those attained by the indemnity company vindicate the theory upon which the Physicians Defense Company is founded. That is, prophylactic as against indemnity insurance. Experience will show that the possession of an indemnity insurance policy invariably incites suits for damages. This is evident because the lawyer who engages in this class of litigation is well aware that the only interest the insurance company has in the suit is the disposal of it as cheaply as possible. He is confronted, however, with a different proposition in case the Physicians Defense Company is back of the doctor. There is no compromise offered and he knows that there is a fund which will be expended in vindication of the physician's reputation. Besides this the Physicians Defense Company maintains a Legal Department for the sole purpose of digesting and analyzing the law relative to civil malpractice and furnishes briefs and suggestions to local attorneys engaged in the defense of its contract holders.

In the past year there have been two verdicts for damages rendered in Minnesuota, one for 14,000 Dollars and the other for 10,000 Dollars and both of these physicians were covered with indemnity insurance policies. Aside from the theory upon which the two systems of defense work we believe that that experience and results will sustain the contention of the Physicians Defense Company as against indemnity insurance companies.

The Physicians Defense Company does what it proposes to do; that is, protect and vindicate the physician's reputation. This is no idle boast, because results of suits in which the Physicians Defense Company has engaged, will prove the statements. On the other hand the indemnity insurance companies do not indemnify, for the simple reason that the amount designated in the policy as indemnity only serves as a bait in the eyes of the damage-suit lawyer and his client and serves as a justification for the jury to render a verdict, whereas it is very seldom that the amount of indemnity is sufficient to cover the verdict.

MISAPPREHENSIONS.

Misapprehension of facts are the greatest sources of injustice, and for this reason we feel warranted in calling attention of our contract holders to the following statements contained in an editorial printed

in the Detroit Medical Journal of December, 1904; page 274. The editorial of which we speak is entitled "Medical Defence" and relates to the plan of medical society defense and the inadequacy of any other kind of defense, such, for instance, as that maintained by a private corporation.

The part of the editorial to which we specially refer is as follows:

"The editor, for example, has paid four annual premiums to such a company and yet defends himself, because with this company a man must carry his policy the number of years allowed for suit under the statute of limitations of his state before he is fully protected by it. What the profession wants is adequate defense during the time that the individual contributes his share to the expense fund, just exactly as life and accident insurance are written. While you are paying you are protected, when you discontinue payments protection ceases."

The contract of the Physicians Defense Company is not of this character. The statute of limitations has nothing whatever to do with its operation, excepting in so much as it limits the liability of the company, as it limits the liability of the physician holding the contract. This contract begins to operate the moment it is issued and covers all acts done during the time it is in force. A contract issued January 1, 1903, to January 1, 1904, will not cover acts done previous to that time. If suit were filed, however, in 1905 for some act committed between January 1, 1903 and January 1, 1905, the contract would cover such suit, although the physician may not be a contract holder when the suit is filed. Any other arrangement would be in effect ex post facto, and would certainly result disastrously to the company issuing such contracts as well as to the contract holder. For, in the first place, any person, after he knew he was about to be sued, could purchase a contract and need not do so until he was sure of being sued. In the second place, after he had purchased a contract, he would have no certainty as to his protection for the simple reason that the contract would only cover the present time.

We trust that the writer of the editorial to which we refer has not been so unfortunate as to possess the character of contract which he describes and apparently advocates.

LEGAL ASSASSINATION.

Friday A. M., December 23, 1904, one day before the court's vacation, the Chicago agent notified this company that it was enjoined from doing business in the state of Illinois. A member of the legal department immediately left for Chicago where, with a member of the local bar, the matter was brought to the attention of the court. The merits of the case were considered and the injunciton dissolved Saturday A. M. December 24, 1904.

Our competitors, the indemnity insurance companies, who instigated this proceedings, are still out of breath. Are these not desperate tactics? Perhaps they have read the adage, "When your case is weak attack the other fellow."

Our contention is that WE ARE prepared and that THEY are NOT. The above is just a little evidence.

Judicial Decisions.

Under this heading will be presented each month information relative to judicial decisions affecting the medical profession.

WHO "ABLE" TO PAY FOR CARE BY BOARD OF EALTH.

Section 51 of chapter 18 of the Revised Statutes of Maine, provide in substance, that when any person is infected with any disease or sickness dangerous to the public health the local board of health may remove him to a separate house, and there care for him at his charge, "if able." The Supreme Judicial Court of Maine holds, Inhabitants of Greenville vs. Beauto, that such a person is not chargeable with any part of the expense incurred if he is not able to pay the full amount. Such a person is not chargeable with the expense incurred if he is not financially able at the time of his discharge, although he was able to labor, and did labor, and afterwards accumulated sufficient money to pay the eexpnse. The phrase "if able" relates to the pecuniary ability of the party at the time the expense was incurred.—*J. A. M. A.*

PRETENDING TO CURE SICKNESS BY REMOVING EVIL SPIRITS.

The Court of General Sessions of Deleware says, in the case of State vs. Durham, that it was claimed on the part of the state that the defendant pretended that a certain Rachel A. Fitzgerald was possessed of an evil spirit, that her sickness was caused by the presence of this evil spirit, and that he alone possessed the power to remove the same, and to heal her disease or cure her of her sickness. The indictment was founded on a statute of that state against pretending to exercise the art of witchcraft, conjuration, fortune-telling, or dealing with spirits, which statute, the court says, is founded in wisdom The purpose of that statute manifestly is to protect people in certain grades of life from being imposed on by persons pretending to possess a power that they do not have. It is a matter of common experience that persons afflicted with disease rely ofttimes on, or give credit to persons who claim to be posseseed of supernatural powers. Those who are oftenest subject to that imposition are particularly people who are weak, and who are in great stress of sickness; and this law was designated to protect just such people from imposters, if any such there be, who may go around and make pretense of healing or curing through the exercise of supernatural power, which the intelligence and

enlightenment of this day utterly denounce and discredit. If the jury believed from the testimony in this case that the defendant did make pretense that he alone had the power to remove these evil spirits and cure Rachael A. Fitzgerald of her sickness by reason of his influence over these spirits, its verdict should be "Guilty." If the defendant was guilty, he ought not to be turned loose. The verdict returned was "Guilty."—*J. A. M. A.*

NON-EXPERT OPINIONS BASED ON INSUFFICIENT KNOWLEDGE.

The Supreme Court of Illinois holds, (Chicago Union Traction Co. vs. Lawrence) that if a non-expert witness gives an opinion without sufficient knowledge of facts to support it, opposing counsel may, on cross-examination, show that it is of little value and should have little weight. It may be attacked on argument, and the jury may be instructed that the weight to be given to such opinion depends on the intelligence of the witness, on his acquaintance with the person if mental condition is the subject of investigation, on his means of observation, and on his veracity.—*J. A. M. A.*

STATE OF MIND OF DECLARANT MAY BE SHOWN.

It must be remembered, the Supreme Court of Illinois says, in Nordgren vs. People, that dying declarations are in their nature merely secondary evidence, and the party against whom they are produced in evidence has no opportunity to cross-examine the party making such declarations. It has been held that, when dying declarations are offered in evidence, it is competent for the accused to show, on cross-examination of the state's witnesses, that the deceased in makiig the statements was in a reckless, irreverent state of mind, and entertained feelings of malice and hostility toward the accused.—*J.A.M.A*

REGARDING SCHOOLS OF MEDICINE, CHEMISTRY, PHARMACY.

The Court of Appeals of Kentucky says, in the case of the Louisville College of Pharmacy vs. City of Louisville, that if the teaching of law, medicine, chemistry and pharmacy in universities does not deprive them of the character of "institutions of education," it seems to the court that an institution which confines its instructions to one of them is no less an institution of education. The question in this case before the court was whether the college of pharmacy mentioned was an "institution of education" exempted from taxation under the state constitution. The court says that it can conceive of no more useful and important branch of knowledge than that of pharmacy. That knowledge is necessary to protect the lives and health of the citizens of the commonwealth. So important is this branch that the General Assembly has taken the matter in hand and has prohibited any one from compounding medicines unless he has been graduated

from some institution of education where pharmacy is taught. In this case public-spirited persons had associated themselves together and organized an institution not for gain or profit, but that persons might be educated in pharmacy so that the drug business might be conducted according to law, and the public protected from the uneducated and ignorant pharmacists. It is a home institution, infantile in the matter of age, and merits the protection given by the constitution. Consequently the court is of the opinion that it is exempt from taxation.—*J. A. M. A.*

LIABILITY FOR CARE OF PERSONS WITH CONTAGIOUS DISEASES.

Section 7059 of the General Statutes of Minnesota of 1894 authorthe board of health of any town, village, borough or city to provide for any resident thereof or person coming from abroad who may be afflicted with smallpox or other contaglous disease. It in part reads: "And shall provide for such person or persons, nurses, medical attendance and other necessaries which shall be a charge in favor of such town, village, borough or city on the person so provided for, his parents, guardian or master, if able; otherwise on the county in which he has a legal settlement, or on the state, if said person be a non-resident of the state and has no property within the state." Under the provisions of this section the Supreme Court of Minnesota holds, (Board of Commissioners of Marshall County vs. Board of Commissioners of Roseau County), that a county is not liable to the various towns, villages or cities throughout the state for expenses necessarily incurred in caring or providing for a person having a legal settlement in said county, who is afflicted with a contagious disease in such municipalities, where the person so provided for is solvent. It says that this section, being section 15 of chapter 132 of the General Laws of 1883, has been greatly confused with section 29 of said act, being section 7073 of the General Statutes of 1894, as amended by chapter 238 of the Laws of 1901, and since reamended by chapter 29 of the Laws of 1902. The act of 1901 has reference solely to expenses incurred by towns, villages or cities in the control of contagious or infectious diseases. It has no reference to expenses incurred in caring for individuals. The line between expenses incurred for the purpose of preventing the spread of such diseases and in caring for individuals may be a delicate one to draw, but it is clear the legislature in the two provisions referred to has fastened a liability on the various counties of the state for necessary expenses incurred by the public authorities of the various towns, villages or cities situated therein in preventing the spread of an infectious or contagious disease; while, on the other hand, by section 7059 it is clearly provided that the various counties of the state shall reimburse towns, villages or cities either stiuated within or without their respective borders, for necessary expenses incurred in providing nurses,

medical attendance and other necessaries for persons having a legal settlement in such counties, who are afflicted with an infectious or contagious disease, but only on condition that they or their parents or guardians are financially unable to discharge such obligation. As this court construe section 7073, as amended, it deals solely with expenses incurred in controlling contagious diseases.—*J. A. M. A.*

VALIDITY OF NOTICE REQUIRED FOR HEALTH INSURANCE.

The Supreme Judicial Court of Maine says, in Whalen vs. Equitable Accident Company, that the former was insured against loss resulting from sickness caused by various diseases, among which was dysentery. The policy provided that failure to give written notice as therein provided within 10 days of the date of the begining of any sickness should invalidate any and all claims under it. The insured fell sick October 17, and no notice was given to the company or its agents of the sickness until December 30. Within 30 days after the insured became sick with dysentery, but not within the first 10 days of his being sick, he became insane. The court holds that the condition in the policy was a valid one, and by its terms the failure to give notice within 10 days of the date of the beginning of the insured's sickness invalidated all claims under the policy. The provisions of the Maine statute to the effect that notice of accident, injury or death may be given to a foreign or domestic casualty or accident insurance company insuring at any time within 30 days after the happening of an accident or injury or death, and shall be valid and binding on the company, do not extend to cases of health insurance. Where a health insurance company, after the expiration of 10 days from the time a party insured became ill, but before it knew the date when he did become ill, sent blank forms for proof of claim to him to be filled out, such conduct did not constitute a waiver on its part of the provision requiring the insured to notify it within ten days from the beginning of the sickness.—*J. A. M. A.*

SKILL AND CARE REQUIRED OF PHYSICIAN AND SURGEON.

The Supreme Court of Rhode Island says, in the malpractice case Bigney vs. Fisher, that whether the defendant used proper skill and care in setting the broken bone in the plaintiff's leg and his subsequent professional treatment of the case were necessarily questions to be determined by the testimony of experts in the science of medicine and surgery. (Barker vs. Lane, 23 R. I. 224.) "The implied contract of a physician or surgeon is not to cure—to restore a fractured limb to treat the case with that degree of diligence and skill which are ordinarilly possessed by the average of the members of the profession in good standing, in similar localities, regard being always had to the state of the medical profession at the time. If more than this is ex-

pected, it must be expressly stipulated for. (S. & R. Neg., 5th Ed., Sec. 605; Am. and Eng. Ency. Law, Vol. 22, Rev. Ed., 799,801; Smothers vs. Hanks, 34 Iowa, 286; Almond vs. Nugent, 34 Iowa, 300; Small vs. Howard, 128 Mass. 131.)In short, a physician or surgeon must apply the skill and learning which belongs to his profession; (Higgins vs. McCabe, 126 Mass. 13;) and, if he do this, he discharges his full liability. The law relating to malpractice is well stated in the late case of Pike vs. Honsinger, 155 N. Y. 201. Under the evidence submitted in this case the court thinks it was clear that the defendant possessed all of the qualifications called for by the rule stated in that case, that he used his best judgment in the case, and that he exercised at least an ordinary, if not, indeed, a high degree of care and skill in his professional treatment of the plaintiff, so that the verdict of the jury (apparently for the plaintiff) was clearly wrong, and must be set aside and a new trial granted.—*J. A. M. A.*

RIGHT TO DETERMINE PHYSICAL EXAMINATION.

The Court of Civil Appeals of Texas says that, in International & Great Northern Railroad Co. vs. Gready, a personal injury case brought by the latter party, who had suffered injuries to his head, back, spine, kidneys, etc., that he consented to an examination by three physicians appointed by the court, which was made; the court adjourning at 11 a. m. for that purpose. The court convened at 2 p. m., and waited three hours. At that time two of the physicians appeared and testified. On cross-examination they stated that they had applied all the tests except chloroform and the electric battery, whereon the company's counsel made a motion to have these tests applied, whereon the court asked one of the physicians how long it would take, and he answered, "I don't know." On further inquiry the physician stated that it was "very difficult to say. For instance, we must get the battery in good working order, which is not always the case. The battery is not used all the time, and it has a trick of getting out of order, and there you are." Whereon counsel for the plaintiff said, "We think there ought to be some limit to this thing, and we don't propose to submit to the pain of it." whereon the court said, "Well, we won't go any further, then." This all occurred in the presence of the jury, and was taken advantage of in argument by both sides. The Court of Civil Appeals holds that the court did not err in not ordering a second or further examination against the will of the plaintiff. It says that the court was without power to require him to submit to an examination. (Railway vs. Cluck, Tex. Sup., 77 S. W. Rep. 403.) Such an examination being subject to the consent of the plaintiff, he could, the court thinks, have terminated an examination while same was being conducted.—*J. A. M. A.*

CAN NOT BE CROSS-EXAMINED AS TO OPINIONS IN OTHER CASES.

The Supreme Court of Illinois says, in Chicago & Eastern Illinois Railroad Co. vs. Schmitz, a personal injury case brought by the latter party against the railroad company and others, that a certain physician was put on the stand as a witness for the plaintiff to testify in regard to her injuries, and on the cross-examination it was attempted to discredit the witness by asking him questions in regard to the professional opinions he had given in other suits brought to recover damages for personal injuries against one or more of the defendants in this case. It was also sought by the defendants to show by direct examination of certain witnesses that the physician in question was interested as a medical man in a large number of personal injury suits against corporations. The court holds that there was no error in refusing to admit this class of testimony. It says that cross-examination on independant cases of the same character, and about the same time as the principal case, is not allowed. The rule is more strict against the use of this kind of testimony in direct examination. The acts and declarations either of strangers, or of one of the parties to the action in his dealings with strangers, are irrelevant. There is nothing in the case of Chicago City Railway Co. vs. Carroll, (206 Ill., 318) which is opposed to the view here expressed. In that case it was held to be proper to ask a physician on cross-examination in a personal injury case by whom he was paid, etc. But the testimony whose introduction is there justified, applies directly to the relation of the witness to the party in interest and to the particular case, and not to his relation with other parties and other cases. It was there said: "It is always competent on cross-examination to ask a witness if he is not in the employ of a party, or if, at the time he rendered the particular service, he was in the employ of such party, for the purpose of showing his relation in the case and his interest in it, as affecting his credibility and weight of his evidence.—*J. A. M. A.*

FOUNDATIONS REQUIRED FOR OPINIONS AS TO SANITY.

The Supreme Court of Iowa says, in the case of Stutsman vs. Sharpless, that attention has been directed in previous decisions to the difference between the foundations to be laid for a non-expert's opinion of the sanity and of the insanity of a person under investigation. (See Alvord vs. Alvord, 109 Iowa, 113: In re Hull's will, Iowa, 89 N. W. Rep. 981.) The facts on which an opinion that deceased's mind was unsound should appear in their natures somewhat inconsistent with mental soundness, as that the acts or talks of deceased were unnatural or unusaul, or such as would not ordinarily be anticipated from a person of his character. In other words, the facts and circumstances must have been such as tended to support the witnesses' conclusion.

But the court says that it was only necessary in this case, as already stated, that the circumstances related tended to indicate an unsound mind. Undoubtedly the witness must have enjoyed adequate opportunity of observing the deceased's capacity, but habits of observation, as well as conditions of the subjects of investigation, differ so radically that no general rule as to what character or number of circumstances shall be related before the witness may speak his opinion can be laid down. (See Wigmore's Evidence, section 689.) Having indicated some facts which tend to support the opinion to be given, the witness should be allowed to express it, and its value, as well as the effect thereon of any explanatory circumstances, as that the condition was produced by a stroke of apoplexy, is for the determination of the jury, rather than the court. It will not do to allow juries to say what facts were material in securing the opinion of a medical expert, and to what extent a variance in the facts would have changed his opinion. The only safe rule is to reject the opinion unless the facts hypothetically stated are established by the evidence. If a portion of the facts are to be eliminated, the witness, and not the jury, should be permitted to estimate the difference this change would effect in the opinion he has expressed.—*J. A. M. A.*

FAILURE TO REGISTER PREVENTS RECOVERY FOR SERVICES.

The Supreme Court of Georgia says that the only question presentd by the record in the case of Murray vs. Williams for adjudication was whether a physician who has registered, as required by the statute, in the county of his former residence in the state of Georgia can, after his removal into another county in the state to reside and practice his profession, recover for professonal services rendered by him in the latter county before he has registered therein. The Code provides that: "Every person lawfully engaged in the practice of medicine within this state, before commencing to practice, shall register in the office of the clerk of the Superior Court of the county wherein he resides and is practicing, or intends to commence the practice of medicine, in a book to be kept for the purpose by said clerk, his name, residence and place of birth, together with his authority for practicing medicine, as prescribed in Chapter 4 of the political Code of 1895. The person so registering shall subscribe or verify, by oath or affirmation, before a person duly qualified to administer oaths under the laws of this state, an affidavit containing such facts, and whether such authority is by diploma or license, and the date of the same, and by whom granted, which shall be exhibited to the county clerk before the applicant shall be allowed to register. The county clerk shall receive a fee of 50 cents for each registration, to be paid by the person so registering."—(Political Code of 1895, Sec. 1479.) "Any such registered physician in this state, who may change his residence from one county

into another county in this state, shall register within the clerk's office of the county to which he removes and wherein he intends to reside and to practice medicine, as provided in the preceding section."—(Political Code 1895, Sec. 1480.) "Any person who shall fail to register or who sahll practice medicine or surgery in violation of the provisions of the Civil Code, shall be guilty of a misdemeanor."—(Penal Code of 1895, Sec, 485.) These sections of the Code, the Supreme Court says, are intended to protect the public against incompetent and unqualified practitioners of medicine, and not for raising revenue, and are, therefore, prohibitory. One who practices medicine without having registered as the Code requires can not recover for his services. Clark on Contracts (2d Ed.), Sec. 153. "Even where there is no express provision that the contract for remuneration for services rendered by an unlicensed physician shall be void, still, if the statute imposes a penalty for practicing without having obtained a license, or without having complied with other statutory provisions, the courts will apply the prohibition, and a recovery can not be had for professional services rendered."—((22 Am. and Eng. Enc. of Law, 2d Ed.) 795.) See also in this connection Conley vs. Sims, 71 Ga., 161 and citations. Wherefor the court holds that a physician who has failed to register in compliance with the provisions of sections 1479 and 1480 of the Political Code of 1895 can not recover for professional services rendered by him, and that the judgment of the trial judge, who decided contrary to the veiws herein expressed, must be reversed.—*J. A. M. A.*

CONFINEMENT OF PERSON ACQUITTED OF CRIME FOR INSANITY.

Chapter 1 of the Public Laws of North Carolina of 1899 provides that: "When any person accused of the crime of murder shall have escaped indictment or shall have been acquitted on the trial on the ground of insaniny, . . . the coust before which such proceedings are had shall in its discretion commit such person to the Hospital for the Dangerous Insane to be kept in custody therein for treatment and care as herein provided," etc. In holding this statute unconstitutional, the Supreme Court of North Carolina says, in re Boyett, that the right and duty of the state to provide for the care and treatment of its insane, with such confinement and restraint of their liberty as may be necessary for that purpose, was conceded. It is made the duty of the General Assembly to do so by Sec. 10, Art. 11, of the Constitution of North Carolina. It was also conceded that the state Ray, pursuant to general laws, and after proper judicial proceedings, confine insane persons for their own protection and that of other persons. It is also true that, to meet sudden emergencies, and prevent either self-destruction or injury or harm to other persons, an insane person may be restrained temporarily without adjudication of his insanity. The writers

and courts bave not undertaken to define the limitations of the power which the state has to deal with these unfortunate people, except by the announcement of general principles essential to their welfare and the protection of the public. A very different question is presented when the legislature undertakes to confer on courts discretionary power to confine persons in asylums or hospitals and makes no provision for notice or adjudication before the order for confinement, or for review of such discretion after the person is committed. It is well settled that a person acquitted by a jury on the ground of insanity existing at the time of the commission of the act is entitled to all of the protection and constitutional rights as if acquitted on any other ground. The fatal infirmity in the statute under consideration is that the power to commit is vested in the court to be exercised "in its discretion." No provision is made for notifying the person whose liberty is involved, nor is the court required to make any investigation either by itself, by examination of witnesses, by calling to its aid medical experts, or otherwise. It may be that the wisdom of the legislature will find, within constitutional limitations, a remedy for the objectionable features of the statute. The court does not wish to be understood as saying that a person acquitted of a grave crime on the ground of insanity may not be detained for a reasonable time, so that by some appropriate proceedings the condition of his mind may, either under the direction of the judge presiding or some other judicial officer or commission, be examined into for the purpose of ascertaining whether his own safety and that of other persons or the public generally requires that he be committed to the hospital for treatment and care. It is well settled that it is not necessary that a jury trial be had; it is sufficient if the inquiry be had in some way and by some tribunal conforming to the constitutional requirement of due process of law. Another and equally fatal objection to this particular statute is that it provides that a person acquitted of a capital felony and committed to the hospital can not be released except by an act of the legislature. It is a fundamental principal that every person restrained of his liberty is entitled to have the cause of such restraint inquired into by a judicial officer. The judicial department of the government can not by any legislation be deprived of this power or be relieved of this duty.—*J. A. M. A.*

MAY RECOVER DAMAGES FOR SECOND MISCARRIAGE.

The Court of Civil Appeals of Texas says that, in Rapid Transit Railway Co. vs. Smith, the wife of the latter party was injured, June 8, in a collision of cars. She was pregnant at the time, and the accident caused her to miscarry the next day. In the following November, having again become pregnant, she miscarried again, which the physician said was the probable result of the accident; and the court does not think that the allegation of a second miscarrigae, November 15, was too remote for a recovery.—*J. A. M. A.*

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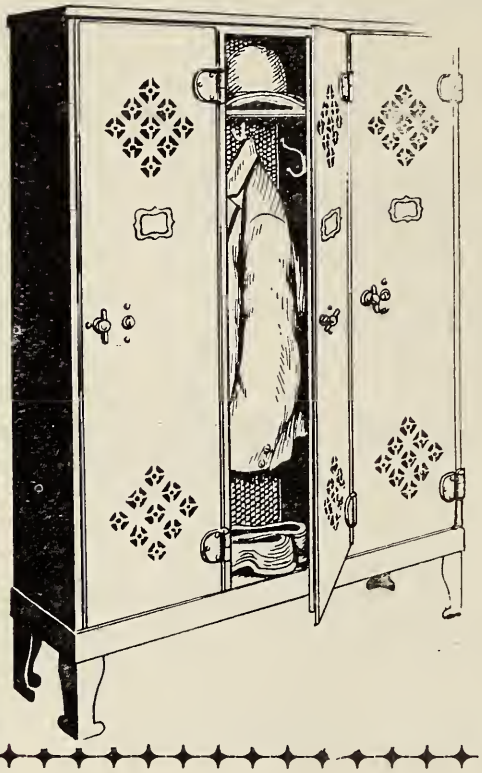

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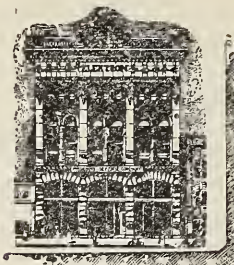

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Immediate notice by telegram, must be given the company at the Home Office at Fort Wayne, Ind., of any suit brought or demand made, and the holder hereof shall immediately forward the summons, or other process served, and the complaint or petition filed, together with a full and complete history of the case and services rendered.

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No suit or claim will be defended by this company, under this contract, in which the cause of action arose previous to the date of this contract.

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The company may cancel at any time the unexpired portion of this contract upon written notice mailed to the holder hereof, and the unearned portion of the consideration therefor, shall be returned to the holder hereof.

This contract does not take effect until the consideration therefor shall have actually been paid to the company or its authorized agent, but if the holder shall have paid such consideration and shall have received from the company or its duly authorized agent a memorandum certifying such payment and that the contract is to be subsequently delivered, then this contract shall be dated as of the date of such payment and shall be in force and effect from that date.

This contract shall not lapse at the end of the time as stated above if the holder hereof shall pay the annual consideration in advance at the Home Office in Fort Wayne, Ind., or to an authorized agent of the company, in exchange for the company's receipt, signed by the president and secretary and countersigned by the agent, but shall continue in force for the term or terms for which such annual consideration shall be paid; provided, however, that the liability of the company under such extension shall not be cumulative.

No consideration or agreement contained in this contract, or application for same, can be waived or altered in any manner by any person, other than the president or secretary, in writing endorsed hereon.

In Witness Whereof, The Physicians Defense Company has caused this contract to be signed by its president and secretary and its official seal attached hereto in

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Medico-Legal Bulletin.

ORIGINAL ARTICLES

THE PROPER SCOPE OF SCIENTIFIC (SO CALLED EXPERT) TESTIMONY IN TRIALS INVOLVING PHARMACOLOGICAL QUESTIONS.

By Solomon Solis Cohen, M. D., Philadelphia.
Professor of Clinical Medicine in Jefferson Medical College.

Mr. President and Gentlemen:—It is by request of your committee of invitation that I shall devote the address I have the honer to make to you today to the consideration of the subject of "expert testimony" in certain of its relations having a common interest for physicians and pharmacists. My criticisms will be addressed principally to our own faults, not those of others. Doubtless there are many motes in the eyes of the lawyers; but before we begin to discuss the best method of extracting them, let us try to discover how we can get rid of the beams that tend to make our own vision oblique.

It is not to be denied that the "medical expert" or "chemical expert" witness is often an object of suspicion to courts and juries; that lawyers out of court find no impropriety in ridiculing him, while in court, if he is on the other side, their attitude toward him is not invariably one of the highest respect for his knowledge or his devotion to the truth. Moreover this unflattering estimate of the sincerity of the expert witness is not confined to courts and lawyers; it is reflected in the press and in the comments of the man on the street. It would be soothing to wounded vanity to attribute the distrust of expert testimony entirely to the obscurity of the difficult scientific questions so often involved and the inadequacy of the legal methods of the day for the development and presentation of such questions. Undoubtedly these impersonal elements are important factors; but it must be admitted that there are also personal factors, and that for the latter physicians and chemists are not without blame. When men of equal reputation and competence can be found, apparently in any desired number, to form either of two opposite opinions upon the same apparently simple set of facts; can be induced to express positive and conflicting views upon questions concerning which the evidence is

insufficient for the formation of a positive view of any kind; and are willing, moreover, to suggest to an attorney questions that seem to have no other purpose than to confuse scientific colleagues who may appear as witnesses on the other side, or unfairly to impugn and belittle the evidence given by such colleagues—is the assumption wholly without plausibility that the nature of the testimony given by anv expert witness is in effect determined by the necessities of that side of the case upon which he is employed? We know and many attorneys know that, despite its plausibility, the assumption is far from being correct. But this is because we and the attorneys know what the newspapers and the public do not know and cannot know; namely, how often physicians and chemists refuse to testify in behalf of interests that have consulted them, because on examination of the facts they find that they cannot truthfully give the testimony desired. That incompetent, inaccurate, overzealous, or even untruthful persons sometimes appear in the role of expert witnesses, playing it very much to the satisfaction not only of their employers, but also of the jury and the spectators—may be admitted. With this phase of the subject, however, I do not propose to deal at this time. I shall consider only the difficulties besetting competent men, desirous to tell the truth and nothing but the truth, when they enter the witness box to instruct courts and juries upon pharmacological and toxicological questions.

In the first place, it is often requisite to state technical facts in untechnical language. There is much difference between lack of technicality and simplicity. The simplest statement is always the best; but the untechnical statement is not always the simplest; frequently it is the most complex. Consider for a moment only the physical and chemical questions of osmosis, of atomic weight, of valency, of crystallization, of stereochemism, of ionization, or the pharmacological questions of the effects of drugs upon metabolism or upon cell structure. How can such matters be expressed in other than technical terms, and yet be expressed both clearly and adequately? The only way out of the difficulty is not to try to get out of it. Let us state our technical position for the record, as simply as possible; that is, in technical terms. We may then explain in untechnical language for the jury. One common result of the effort to avoid technical statements is a multiplication of words from which juries, even more intelligent than the average, can gather no clear idea. Another is an impossible simplification of a difficult problem, which is consequently, even though a correct conclusion is reached, open to just criticism—a fortiori to captious criticism. Just here comes to light one grave fault of medical and chemical experts. We are too prone to make and to suggest that very kind of captious criticism of the testimony of an opposing witness, not for the purpose of eliciting truth, but in order to score a point in the game. Such tactics may

be perfectly proper on the part of an advocate, but not on the part of one who professes to be impartially devoted to sceince.

And this brings into view a second difficulty. Theoretically, the expert witness is an adviser of the court. He is called in, because of his supposedly superior knowledge, to help the judge and jury to understand the significance of certain facts testified to by himself of others, which cannot be understood without such assistance. He should have no interest in the bearing of these facts upon the verdict to be rendered. Was or was not the arsenic present in a certain liver or stomach examined by him? Do or do not certain post mortem appearances or certain symptoms observed during life indicate death from poisoning? Is or is not the continuous and unsuspected administration of unknown quantities of boric acid or salicylic acid or sodium sulphite injurious to health? These and like matters are the subjects upon which he is called to state judgments of facts or to express opinions, and in consequence to detail the observations and explain the reasoning upon which such judgments or opinions are based. But his interest in the matter should be entirely scientific. It should be no concern of his, as a witness, whether the presence or absence of arsenic in the tissues or other materials that he has examined, or the significance of the symptoms described, or the harmfulness or harmlessness of chemicals used as foos preservatives, may lead to the conviction or acquittal of any individual or the gain or loss of any commercial interest. His function in court is quite clear. It is (a) to describe the methods and results of his examinations. (b) To state the conclusions that his study and observation in general enable him to draw from a given set of facts observed and described by him or testified to by others. (c) To enlighten the court as to matters of scientific knowledge relevant to the issues presented, but not dependent upon any testimony as to fact given in the special cause at trial. Beyond that, his testimony, his advice, his interest, should not go.

Under present methods, however, the expert witness is not summoned in his theoretical capacity of impartial teacher and adviser. He is called apparently, and often in reality, as a partisan and an advocate. Indeed, whatever his own view may be as to his relation to the case, he is usually regarded and treated as a partizan and advocate by judge, jury, lawyers, spectators, and newspapers. How often do we read in great headlines of the "Battle of the Experts?" How often is the speculation heard, privately or publicly, as to whether the prosecution or the defense will "get Dr. A." with the implication that the other side will then necessarily get" Dr. B," and that Dr. A and Dr. B will, of equal necessity, express in court opposite opinions on the same facts.

There is unquestionably a legitimate field of work for the scientific or "expert" advocate; but it is by the side of counsel, not in the witness

box. As witness one is bound by his oath and by his duty to the court and to the state to endeavor to assist judge and jury to reach correct conclusions, without reference to the effect of those conclusions upon the verdict to be rendered. He is to distort nothing, magnify nothing, assert as positive nothing doubtful, throw doubt upon nothing certain; introduce nothing irrelevant, suppress nothing material, give uttearnce to no statement of fact, advance no theory that he would shrink from rendering before a learned society. But as advocate, one may properly consider the bearing of testimony upon the verdict and endeavor to have judge and jury impressed with the special importance of those facts and theories making for his side of the case, and with the doubtfulness and unimportance of those making for the opposite side. The functions of the witness and of the advocate should therefore never be united in the same person. Human nature being what it is, however, our present methods tend to imbue expert witnesses with somewhat of the advocate's spirit. Some do not realize this tendency; others despite their effort to avoid partisan advocacy are badgered into it by the unfair efforts of cross-examiners to throw doubt and obscurity upon their direct testimony. Unfortunately these efforts are sometimes instigated and directed by the expert witness of the other side.

The remedy for this difficulty lies wholly in our own hands. It will not do to abuse the lawyers for it, however much they may abuse us when we are on the witness stand. Use, abuse, or misuse what and whom they will, they cannot make use of us for any purpose for which we refuse to be made use of.

A third order of difficulties has been alluded to, but may now be considered more fully. It is often assumed that expert witnesses are not called to give testimony as to fact, but merely to express opinions, and that hence opinion may properly be set against opinion. This is but partially true. Expert witnesses are frequently called to express opinions upon facts which they must themselves first testify to; or to express judgements of fact—and not opinions at all—upon investigations that they have themselves made. This is especially the case with chemists and pathologists. We can here confine our attention to chemists.

A chemist or pharmacist may be asked, for example, to make certain analysis in order to determine the purity of pharmaceutical products, or to ascertain whether foods or articles of commerce have been adulterated or have had foreign substances added to them to color, disguise, or preserve them; or to discover whether certain substances—sometimes human tissues—contain poison. He submits the suspected articles to certain physical and chemical manipulations; examines them with the naked eye, with the microscope, with the spectroscope, and otherwise. Upon the results of these examinations

he forms a judgment. When describing in court the methods and results of his examinations, it will be generally admitted that he testifies as to facts. How about the judgment he has formed? That judgment, when stated in court, is commonly treated as an expression of opinion. In reality it is a judgment as to fact, as valid as to any other judgment as to fact that can be made the subject of testimony. It differs from ordinary judgments in that special skill and knowledge are required, first, to obtain its data and, secondly to understand their significance; but so do many other judgments that we never think of treating as matters of opinion—which are indeed recognized to be therefore more accurate, not more dubious, than ordinary judgments; for example, that of a navigator as to the position of his ship, or of a surveyor as to the dimensions of a certain plot of ground, or of a skilled weigher as to the number of pounds contained in a heap of coal. The differences that may exist among these various judgments are not those of kind, but merely of degrees of complexity. Such judgments may be mistaken; but that, while it subjects them to correction, does not remove them to the category of opinions—unless the term opinion be extended to include every mental operation in the nature of a judgment.

Testimony concerning chemical analysis and its results is properly to be subjected to criticism as to the pertinency, correctness, skill, and accuracy of the manipulations and as to their conclusiveness; but such criticism deals with fact, and must be kept within due bounds. It is perfectly proper to point out, for example, that in the attempted identification of poisions, a careless observer may mistake antimony for arsenic; but it is misleading—and a competent chemist must consider it deliberately so—to attempt to make a jury believe that discrimination between arnseic and antimony is at all uncertain when the right tests have been made with due care and intelligence. It is not in any degree a matter of opinion, subject to debate and dispute, but an acknowledged fact of science. No expert should lend himself to a pettifogging practice of the nature described.

Again, it is proper to point out and inquire about all sources of error in manipulation, but undue insistence upon widespread contamination of vessels and reagents with, for example, arsenic, can be considered onlp captious criticism in the presence of statements that due care has been taken by blank tests and otherwise to exclude that source of error and when amounts have been found not to be accounted for even approximately by these common contaminations. I have elsewhere suggested that important examinations by official analysts should be made in the presence of experts representing the other side; or that both sides should, in cases in which this method is possible, be permitted to have analyses made by their respective experts. The further suggestion was also made that the results of final and decisive

tests should be required to be preserved for exhibition and criticism in court. Such procedures would go far, I think, to avert the sort of criticism here deprecated and also to guard against incompetence carelessness, or error, on the part of official or other partizan analysts.

Opinions may in certain cases of chemical analysis differ as to the scope and conclusiveness of special tests. In all such cases it is a simple matter for the expert witnesses on both sides to state the issue, first in technical terms for the record, secondly in non-technical terms for the enlightenment of court and jury, and in such a way as to make clear the exact point in dispute and its bearing on the final judgment of fact. It is also easy to take the opposite course in order to becloud the issue. Were the straightforward, scientific, impartial way obligatory in every instance, many issues which have been allowed to occupy much of the time and attention of courts and juries would at once be shown to be based on trivialities of no possible importance in the cause at trial.

Still another source of confusion between fact and opinion arises from the questioning of expert witnesses as to what may be termed facts of science, and the failure of courts to rule uniformly as to just what testimony of this kind is admissibble and what is inadmissible. One court will permit the widest and wildest latitude; another will exclude as "hearsay" all matters outside the personal experience of the expert witness. I do not purpose to discuss these conflicting rulings from a legal viewpoint. Shall doctors decide then judges disagree? But I may be permitted to point out the logical and scientific difficulties involved in both positions.

First let us consider the position of an expert witness called upon to differentiate between the knowledge he has obtained from reading and that which he has acquired by personal observation. How far a chemist or pharmacist may be able to do this, I do not know. If you have all verified by balance-tests and other appropriate methods the atomic weights, the valencies, the electric positions, and other properties of all the elements, and the structures of all the compounds, perhaps you may begin to think of qualifying under "no herasay" rule. I doubt, however, whether one physician could state accurately how much of the composite pictures he carries in his mind of the symptomatology and pathology of diseases and of the effects of drugs—even a disease so common as typhoid fever or of a drug so much used as opium or mercury, is based upon cases personally observed, to the exclusion of those read about. One of the best known pathologists in America, a man of enormous experience, told me that he had never personally made a post mortem examination of a case of combined sclerosis of the spinal cord, although of course he had seen and studied sections of cords from such cases. Some physicians have never seen a case of infantile scurvy; but they know that the affection exists

and that it gives rise to discolorations of the skin that are often mistaken for bruises, and upon which unfounded charges of cruelty to children may be brought. I have never examined a thyreoid gland for iodine or arsenic, yet I know that iodine is constantly, and arsenic sometimes, found in thyreoid glands of men and animals, apparently in each case as a normal constituent. If the question of the possible presence of iodine or arsenic in normal thyreoid glands should be of importance in a given trial, could I not properly state my knowledge as book knowledge? Must one send for Mendel or Gautier to testify to personal analysis? I have never seen an insane person commit homicide or suicide, yet I have testified in court that certain persons ought to be kept under restraint lest they should kill themselves or others, and I believe the testimony was properly made and properly accepted. Would not the "no hearsay" rule exclude this testimony? Even had I seen the dead bodies of insane suicides or of the victims of homicidal maniacs, that fact would not seem to remove my knowledge from the hearsay category; nothing would do that except actually seeing the killing. I know that arsenic poisoning has been caused by contaminated beer, by wall paper, by stockings, though I have never analyzed beer, wall paper, or stockings for the presence of arsenic. I know that in this city fatal lead poisoning has been caused by cakse colored with chrome yellow, though I did not see any of the cases. I have not even seen the men at work painting or making lead whom I have treated for lead poisoning acquired in such occupation.

That iodine is a constant normal constituent of the thyreiod gland and that Gautier, Bertrand, and others have found arsenic in the normal thyreoid gland and other normal tissues; that maniacs have committed homicide and suicide, that arsenical poisoning has been caused by contaminated beer—are facts, not opinions. They are facts known only best to certain persons because those persons have made special studies involving the knowledge of such facts; and whatever the law may be, it would appear reasonable that such facts should when revelent to the issue, be testified to in court by qualified persons as part of the sum total of the knowledge acquired by their reading and observation. On the other hand, when a fact of this nature is uncommon it is perfectly proper to bring out its rarity, and, if such is the case, to show that while an integral portion of the witness' knowledge, it is outside of his personal observation.

So much for the one position. Now for the other. To confine ourselves to a chemical illustration, which may have toxicological bearing, let us take Gautier's observation of the presence of arsenic in the normal human body. If this bare statement should be permitted to be made in court in a case in which the presence of arsenic in a given body is the basis of a murder trial, one can see that justice might easily be defeated. If Gautier himself was testifying he would say, as he

has written, that arsenic could be found in normal human bodies only by the use of a certain very delicate technique, which I need not here describe; that he had found it only in the ectodermic structures, and chiefly in the thyreoid gland; that he had never found it in the normal liver or normal stomach or normal muscles. He would add that even in the thyreoid gland, he had found it only in minute quantity—about 16-100 of a milligramme in the average human thyreoid; that is to say, in the proportion of about 1-400,000,000 of the average body weight; so that if by any inconceivable post mortem diffusion the thyreoid arsenic should escape into all the tissues it would be in a proportion absolutely beyond detection, the least that he has been able to detect being 1-20,000,000; that is to say, 1-200 of a milligramme in 100 grammes of tissue. To translate this in to grains, it would take 100 thyreoids—or, if diffused, 100 entire human bodies—to yield 1-4 grain of normal arsenic to Gautier's test; or to follow Gautier's fair statement to the letter, even doubting the assumed quantity of normal arsenic in a cadaver to 32-100 of a milligramme to allow for possible traces in the skin and its appendages, we should need a mass equal to 350 bodies to give us the 1-4 grain. A simple arithmetic calculation therefore shows that this observation, what ever may be its physiological importance, has little medicolegal bearing. But the partial expert witness, that is, one who is telling only part of the truth in order to serve one side of the case—might say that Gautier had found arsenic in the normal human body in recognizable quantity and omit to say anything further. Or he might be ignorant of the details, even if the attorney for the prosecution was sufficiently well posted to inquire concerning them on cross-examination; and the whole truth thus failing to be brought out, a partial and therefore false impression would be left on the minds of the jurymen. Again, the widespread distribution of arsenic in nature and art might be testified to by expert witnesses, truthfully in a sense, and yet partially, and therefore untruthfully in the large sense. By such testimony a jury might easily be misled as to the real significance of the facts. For this is all matter of fact, not of opinion, whether or not it be matter of personal observation. While, therefore, the mere circumstance that a witness has not personally observed the fact of science concerning which he is questioned should not bar his testimony, it does seem that courts should exercise considerable caution as to the admission of such testimony, and might rightfully insist, first, that its relevancy to the special case at trial be estabished; secondly, that the witness should be required to affirm his familiarity with all the pertinent details of the special facts to be testified to, and furthermore be required to state them, even in the absence of cross-examination. Failure on the part of a witness to make such full statement should then be considered sufficient, if shown, to throw out all his testimony. This rule would at least tend to discourage witnesses from giving partial and misleading testimony.

Another order of testimony given by experts relates to matters purely of opinion. Here the position becomes more difficult both for court and witness.

A pharmacist testifying as a matter of chemical fact that he has found a certain quantity of arsenic or strychnine in a human body, may be asked whether it is sufficient to kill or indicates that there has been in the body at any time sufficient to kill? The least quantity of arsenic or any other poison necessary to kill a human being should be a matter of fact; it is, however, for many reasons, one of opinion. In the first place the experiment has never been made under rigorous conditions. In the second place, in most, if not all, of the recorded cases of poisioning, alike in those attended with recovery and those ending fatally, either the exact quantity taken is unknown, or it is so large that no estimate of a minimum lethal dose can be based upon it—while in cases of recovery from large doses there has often been evaeuant, antidotal, or other treatment. In the third place the individual variations in response to drugs of all kinds are great. Moreover the heresay element must be large in such opinions. A pharmacist has knowledge of the doses ordinarily prescribed, and from his reading has some knowledge of the symptomalogy of drug poisoning; but his observation has not been, like the physician's, of a character that such reading may be assimilated therewith; and there thus seems to be a valid objection to the admission of his answer. Similarily he may be questioned as to the harmfulness of adulterants or preservatives of food. Here again his observation is not of such a character that his answer can be anything more than opinion; and the line of his studies does not ordinarily lend authoritive weight to his opinion on such topics. But the physician occupies a different position in respect to these questions. They form an important part of his studies and are integrated with the whole mass of his knowledge. He is therefore entitled to express an opinion concerning them; and although he may never have deliberately or accidentally poisoned any one with boric acid or salicylic acid, or may never have recognized impure benzoic acid as the cause of stomach and kidney disease in his patients, his opinion that such substances can and do injure the human stomach and kidneys should be accepted in evidence. Absence of knowledge on these subjects, should not, moreover, be twisted by an expert witness into knowledge of absence of injurious effects.

Other cases, however, present difficulties to a physician asked to give an expert opinion. Thus, on matters of chemistry and pharmacy outside his experience, his opinions are ordinarily of very limited value. But let us also consider cases that may be within his experience.

A physician who has observed a patient during life and has not suspected poisoning, may after the death of the patient have his suspicion aroused, and in reflecting upon the symptoms he may see a

new significance in them; this suspicion may be confirmed by the post mortem examination and the chemical analysis. His honest opinion based upon all the facts may then be different from the one previously expressed upon partial knowledge or even embodied in a death certificate. Yet unfortunately he is exposed to an adversion because of his change of view. Still more difficult is the question presented in a case of suspected poisoning to a physician who has not seen the living person or the corpse, but is asked to express an opinion on facts described by others as to the nature of symptoms during life, and as to the cause of death. Here the question is one of pure opinion, for the facts are all beyond his knowledge. It is evident that in the absence of complete and careful observation the facts may be manipulated as to give apparent basis for discrepent opinions. One set of circumstances is made prominent by witnesses for prosecution. Few, if any, scientifically accurate observations have been made of symptoms. The autopsy may have been defective in various ways. The testimony of witnesses not only on opposite sides, but on the same side, may be contradictory, or even in certain particulars self-destructive from a scientific viewpoint. The physician may thus be inclined to minimize in his own mind certain testimony, which, nevertheless, he is called upon in his sworn opinion to give credence to. Evidently when he cannot form a positive opinion, it is his duty to say so, and not to attempt to twist and force dubious or insufficient evidence into the support of a partisan, because partial, view. Again, an expert is forbidden to formulate questions which he is to be called upon to answer, and yet some error in the formulation may apparently color his testimony otherwise than he desires. He must avoid this by formulating his answer so that it shall tell its own story independently of the question, and by limiting his answer so that it may be positive only so far as the facts are positive; and qualified as to uncertainty or probability when the facts so demand.

Many other orders of difficulties affecting expert testimony on pharmacological questions might be stated, but those discussed seem to be the main ones, and perhaps if they can be averted the others will, to a large extent, disappear.

In addition to the practice of controlled examinations and exhibition of results already alluded to, I have elsewhere suggested a method that would do away with our main difficulties, but this method is not likely to be adopted for many years, if at all. It is too simple and direct. That method is the submission of purely scientific questions to a commission of experts, who shall, in advance of the jury trial, hear the relevant testimony as to matters of fact, including the methods and results of any scientific examinations, but no mere opinions from witnesses; opinions being put forth by experts frankly appearing as advocates, and arguing upon the testimony submitted. Such a com-

mission could submit to the court a report or reports, which would thus become part of the evidence heard by the jury that has to find the verdict, and before whom no expert should appear as witness.

In the absence of this simple and direct way out of present difficulties, is there any other? Yes, if we, physicians, chemists, and pharmactists, choose to take it. When we are called upon to consider the facts in a given case in order to determine their significance, and what testimony we can give concerning them, we should make certain stipulations, and I may add that there is little difficulty in securing the assent of attorneys to reasonable conditions. An attorney who should refuse his assent, would I judge, be a first class attorney NOT to be associated with. These stipulations are:

1. That there is no obligation to testify or to give counsel involved in the acceptance of a fee to examine papers or otherwise look into the facts. This is, I believe, usually understood.

2. That the nature of the testimony to be given, in case the preliminary examination permits an agreement to testify at all, subject to modification by the subsequent disclosure of new facts at the trial or otherwise; and that the attorney must then decide for himself whether or not to call one as a witness.

3. That one is to be asked only simple and direct questions permitting the framing of answers that will bring out the whole truth as one sees it, and not merely fragments of the truth.

4. That one is not to be expected to be positive upon certain matters, or to throw doubt upon those that are not doubtful.

5. That one is not to be asked questions to which correct answers must be highly technical, and which can therefore only obscure the issue. That, indeed, one is not to be asked such questions for the very purpose of obscuring the issue.

6. That one must be expected to answer frankly all questions by opposing counsel, without reservation or evasion, regardless of the effect of such answers upon the theory of either side.

7. That one is not to be asken irrelevant questions, for the purpose of consuming time or raising clouds of dust; or to be asked to make captious criticisms of the testimony or methods of others; or in any way to be made a party to methods of presentation of facts and opinions, which, however admirable from the viewpoint of an attorney's efforts to serve his client, are opposed to the spirit of truth-seeking science.

It is not to be expected that one can alter the badgering, hectoring, and efforts at confusion which present judicial standards permit and even applaud in cross-examination. But one can at least refuse to supply ammunition for such practices, to support them, or to countenance them.

A more difficult ethical question than we have yet considered is

that presented to a chemist who is called upon to make an analysis of suspected substances. Suppose his analysis reveals the presence of that which the attorney consulting him wishes absent, or vice versa. Is he to insist upon being called as a witness? It is no longer a question of testifying—for the attorney will not wish him to do so—but of not testifying. An analogous question is sometimes presented to pathologists. How shall it be decided? Suppose a chemist or a pathologist has been asked to examine the tissues of a person supposed to have been poisoned, for evidence of the poison or its effects? This is not a mere matter of opinion but of fact. He fails to find such evidence. Or take a somewhat simpler case: Suppose a chemist is asked to examine suspected powders or liquids or foodstuffs for the presence of poison and fails to find it. It is possible that his negative testimony might help the accused person. If the public prosecutor nevertheless proceeds to trial, being satisfied upon other grounds that such is his duty, and fails to call the chemist or pathologist who has made the negative finding, is it the latter's duty to volunteer his evidence? The answer to that question is beyond the scope of this paper, but, nevertheless, the question needs to be stated.

SUMMARY OF CONCLUSIONS.

First. The difficulties attending expert evidence upon pharmacological questions could be in large part obviated; (a) by adopting the principle of controlled examinations, with preservation of portions of materials examined and exhibition of material results; (b) by submitting scientific questions to the judgment of a jury or commission of experts who should report to the court and whose unanimous report or discrepant reports should be submitted to the trial jury as part of the evidence in the case. Before such a commission scientific experts might be allowed to appear frankly as advocates arguing upon evidence submitted, but no mere opinions should be given as evidence; it being the function of the commission to formulate opinions for the guidance of the court and jury having final decision of the case.

Second. As the plan suggested in the foregoing paragraph is not likely to be adopted for many years, if ever, the duty devolves upon physicians and pharmacists called as expert witnesses under the present system to guard their own actions and evidence so that the reproach of partizanship and venal interest which now justly or unjustly attaches to the testimony of experts upon pharmacological questions may be removed from the honest and competent majority and a sharp line of distinction be manifest between them and others.

Third. The chief difficulties that honest, sincere and competent expert witnesses have to meet are of three orders:

(a) The necessity to state technical matters in untechnical terms. There is no way of avoiding this and the expert can only meet

it as best he may, deliberatly using technical terms when necessary to make the record complete, and afterward explaining them as well as possible in untechnical language.

(b) The combination of witness and advocate in one person. This tends to the presentation of partial and therefore partizan testimony, which in the attempt to draw conculsions from insufficient evidence may lead to undue magnification or minimization of certain facts, to the slurring or suppression of material data, to the introduction of irrelevant matters and especially to captious criticism of the investigations or opinions of others. This can be remedied only by the expert himself.

(c) The confusions of judgments of facts, the result of scientific research and analysis, with opinions, and like confusion concerning statements of facts of general scientific knowledge. This can be remedied only by calling the attention of courts and lawyers to the principles involved and thus educating them to a better method.

(d) The request for information of an opinion addressed to one whose studies have not qualified him to speak authoritively upon the special question involved. The remedy for this lies exclusively with the expert himself.

Fourth. It is not fair to condemn lawyers for the abuse and misuse of expert evidence, seeing that lawyers can use an expert witness for no purpose which the witness refuses to be used for. Courts may, however—from the viewpoint of scientific investigation—err both in the admission and in the exclusion of expert testimony.

Fifth. Newspapers and the public in general usually do grave injustice to the members of our profession, inasmuch as they do not know how often physicians, chemists, and pharmacists, after examination of the facts in special cases, refuse to testify on behalf of the interests that have consulted them.

Sixth. Physicians and pharmacists asked to give expert testimony should stipulate that they are to tell the whole truth and to answer frankly and fully the questions of counsel on the other side; that they are not to be asked to lend themselves to pettifogging or obscuration of any kind; that their opinions are to be held subject to modification by any additional facts that may be disclosed; that they are not to become advocates on or off the witness stand.

Seventh. The expert or scientific advocate has an honorable and useful field of work as assistant and adviser to counsel; but his place in court is by the side of counsel, not on the witness stand.

N. Y. M. J. & P. M. J.

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MEDICAL ETHICS AIRED IN NEW JERSEY COURT.

Several physicans called on the witness stand in the Second District Court today where the suit of Dr. Francis J. J. Tetreault, of Orange, against John F. Hart, of West Orange, was in progress, gave interesting testimony regarding the prices charged in Newark and vicinity for professional calls. It all depends on what the patient was able to pay, they said.

One doctor, in giving his opinion, said that a physician here was warranted in charging $3 for a call upon a patient in good circumstances If the patient, he said, was so situated that he would be classed among those who have to do a considerable amount of work to get a living, $2 would be enough, while should the sick man be very poor, one who labored hard with his hands for small wages and was unable to save much money, $1 would be about what should be asked. For treating the very poor, he said, the doctors often would take no pay at all, while should the patient be very rich he might be charged at the rate of $4 a call. All this, it was explicity added, was for just a call. Other things were extra.

DEFINITION OF A CALL.

A definition of just what a call consisted of it was impossible to

get in any concise form, but generally speaking it would seem to be from the questions asked and answered, a personal examination at the home of the patient and the prescription of remedies in all instances where the case was not so severe as to admit of special charges.

This evidence came out in a dispute between the plaintiff and Mr. Hart, for the treatment of whose daughter a year ago last fall, he sent in a bill for $233. Miss Hart, a girl of 20, was injured in a railroad accident in October, 1903, and it was the contention of the defendant that because of its being a railroad case the attending physician had padded his charges way past all reasonable limits. The bill was produced in court, and it was called to the attention of the jury that on single days the charges ran up to $10 and $11, and sometimes more. Besides the charge for the call extras were charged for examination medicines, treatment and bandages.

The plaintiff was the first to take the stand, and he insisted that he had more than earned all he had asked for. Other physicians, Dr. Lehlbach and Dr. J. Henry Clark among them, also testified that the bill appeared to them to be reasonable enough, but when Mrs. Hart, the wife of the defendant, got a chance to testify, she swore that some of the calls charged had never been made, and that in cases where substantial sums had been charged for a call, for medicine, for examination and for treatment, the whole operation had taken not more than ten minutes.

AS TO TWO CALLS.

The question was raised by the defendant's attorney, Benjamin F. Weinberg, as to whether a physician had a right to make two separate charges without reduction for calls upon two people in the same house at the same time. It was claimed that in the case in question this had been done repeatedly. In regard to this point, Dr. Clark said:

"A physician ought, when calling upon two people in the same house, to make a regular charge for one and an office charge for the other, but if the call also includes a treatment or examination or any special service he has a perfect right to make a double charge under those circumstances, making no allowances whatever for the convenience of the two calls under one roof."

Judicial Decisions.

Under this heading will be presented each month information relative to judicial decisions affecting the medical profession.

November 17th two Supreme Court decisions were filed by the Supreme Court of Iowa relative to the practice of medicine. One the "State of Iowa vs. G. H. Heath" and the other, "State of Iowa vs. J. Wilson Edmunds." The former was on an "appeal from District Court of Boone County, W. D. Evans, Judge," and the latter an "appeal from Wright County District Court, J. H. Richard, Judge."

The charge in the Heath case was that he was "practicing medicine without having obtained a certificate entitling him to do so." It was shown on the tral that he had engaged rooms at Boone and advertised himself as a cancer specialist and magnetic treatments," with a list of the diseases he professed to cure. He "had patients call on him for consultation. His method was by what is known as 'magnetic treatment' but he did not in fact treat any person in Boone County as a doctor or physician or osteopath, and did not receive any compensation for treatment to be had in the future. Should he have had patients he expected compensation for treatment, though he never pretended to use any medicines or drugs or resort to surgery in any form. Upon this showing, together with an admission that the defendant had never obtained a certificate from the State Board of Medical Examiners, the Court, on motion, directed a verdict of acquittal and judgment was entered accordingly. The State appeals." Decision by Judge Ladd.

We do not have room in the Bulletin to quote largely from the opinions, but shall give the main points and the conclusion. The Court refers to the penalties in section 2580 of the Code against practicing medicine, surgery or obstetrics without first having obtained a certificate as a physician from the State Board of Medical Examiners and quotes in full Section 2579 which defines who shall be deemed to be practicing medicine. After referring to the natural and grammatical construction of the language employed in the section the Court says:

The manifest intention of the legislature was to divide those who shall be deemed practicing medicine into three classes: (1) All "who shall profess to be a physician, surgeon or obstetrician and assume the duties.' (2) 'Those who shall make a practice of prescribing, or prescribing and furnishing medicine for the sick,' and (3) 'Those who

hall publicly profess to cure or heal.' The Court further states: "It is doubtless true that a mere public profession of an ability to heal would not subject anyone to the penalties of the law. Such profession must be made under such circumstances as to indicate that it is made with a view of undertaking to cure the afflicted. One publicly professes in announcing to the public generally his claim of skill in the art of healing and is guilty under Section 2580 of the Code, if without a certificate and not within the statutory exceptions, this is done with the purpose of treating the maladies of patients who may engage his attention." * * * * The statute in order to be effective has denounced the public profession that he will cure or heal and this may be proven without exacting evidence that he has actually undertaken to do so." * * * * "The power of the State to prescribe such restrictions and regulations in the practice of medicine as in the judgment of the legislature shall protect the people from the consequences of ignorance or incapacity as well as deception and fraud, has been vindicated too often to require citation of authority. The statutes do not attempt to discriminate between the different schools of medicine for systems or the cure of disease. No method of attempting to heal the sick, however occult, is prohibited. All that the law exacts is that whatever the system, the practitioner shall be possessed of a certificate from the State Board of Medical Examiners and shall exercise such reasonable skill and care as are usually possessed by practitioners in good standing of that system in the vicinity where they practice. This excludes no one from the professoin but requires all to attain reasonable proficiency in certain subjects essential to the appreciation of physical conditions to be affected by treatmens. The object is not to make any particular mode of affecting a cure unlawful but simply to protect the community from the evils of empiricism."

The Court sustains Section 2576 in its requirement that "all regardless of the particular school" shall be examined in anatomy, physiology, general chemistry, pathology and obstetrics. Surely it is not unreasonable to exact from everyone who proposes to undertake to prevent, cure, or alleviate disease and pain some knowledge of the nature of diseases, its origin, its anatomical and physiological features, and its curative relations. * * * At any rate, the State, in order to guard the people against the effcet o fimposition or ignorance, had the right to exact such knowledge. The examination in materia medica, theraputics, and the principles and practice of medicine must correspond to the school according to which the applicant proposes to practice. If no medicine is to be used it necessarily follows that proficiency in these subjects is not required. These views are in harmony with the authorities generally. * * * * Decisions reaching a contrary conclusion construe statutes so radically different from those of this State that they furnish little aid. * * * * In the instant case

it conclusively appears that the accused confessed publicly to heal a great variety of ailments and so did for the purpose of procuring patients and treating them. The question of his guilt should have been submitted to the jury."

In the Edmunds case the Court says: that the charge in the case was that the defendant, being a non-resident, assumed the duties of, and pubilcly professed to he, a physician, and hid attempt and profess to heal and cure diseases by dieting his patients and causing them to take certain exercises and to wear glasses furnished by him; that he went aout and in various ways solicited persons to meet him for treatment, and did, while so practicing as an itinerant physician, treat and attempt to cure injuries, diseases, etc. Did the acts charged constitute an offense under the laws of Iowa? Section 2579 of the Code defines "physician," "practice of medicine," etc., as follows:" Any person shall be held as practicing medicine, surgery or obstetrics or to be a physician within the meaning of this chapter who shall publicly profess to be a physician, surgeon or obstetrician, and assume the duties, or who shall make a practice of prescrbing or prescribing and furnishing medicine for the sick, or who shall publicly profess to cure or heal." Section 2,580 provides a penalty to be imposed on "any person who shall practice medicine, surgery or obstetrics in the state without first having obtained and filed for record the certificate therein required." Section 2581 defines an "itinerant physician" as follows: "Every physician practicing medicine, surgery or obstetrics, or professing or attempting to treat, cure or heal diseases, ailments or injuries, by any medicine, appliances or method, who goes from place to place, shall be considered an itinerant physician." This section also provides for a license fee of $250 per annum, the same being payable into the state treasury for the use of the state of Iowa. Such license may issue only to such as hold a certificate from the State Board of Medical Examiners. It was contended that as the defendant did not profess or attempt to cure by any medicine, appliance, or method similar to medicine, but by dieting his patients, etc., his acts did not come within the prohibitions of section 2581. The Supreme Court says that the question here was a narrow one, depending wholly on the construction to be given the words "medicine, appliance, or method." Do they mean a medicine or drug, or something administered as a medicine or drug would be? The court thinks this too narrow a construction. It as that an appliance can hardly be said to be a medicine or drug, and a method may or may not involve the adminisration of any substance, either internally or externally. True, when general terms follow specific words of a like nature, the general terms are presumed to embrace things and methods of the kind designated by the specific words. But for this rule to apply, it must appear that the general words are of a like nature. This was not true here. Undoubtedly the state

has the right to determine what acts shall constitute the practice of the healing art, and it may impose conditions on the exercise of that privilege. Having defined the terms it uses, courts should accept the definition given, and not be too subtle in the use of refined distinceions. To save its people fom quacks and charlatans, the state has plenary power to probibit or supervise the exercise of the healing art.Statutes similar to the one in question have been enacted in many states, and they have been held to apply to magnetic healers (State vs. Parks, Ind. Sup., 59 L. R. A. 190, with notes and briefs); empirics (Musser vs. Chance, 29 Ohio St. 577; Nelson vs. State Ky., 57 S. W. 501); obstetricians (State vs. Welch, 127 N. C. 579); midwives (People vs. Arendt, 60 Ill. App. 89); Christian Scientists and osteopaths, although there is a decided conflict in the authorities as to these two classes of healing (Little vs. State, 60 Neb. 749; People vs. Jones, 92 Ill. App. 445; SState vs. Buswell, 40 Neb. 158; contra, State vs. Myloid, 20R.I. 632); and itinerant practitioners (State vs. Blair, 92 Iowa 28). See also state vs. Heath, 101 N. W. 429 (reported in The Journal Jan. 7, 1905). Cases from other states cited and relied on by the defendant's counsel were not in point, for the reason that the statutes therein construed were not so broad as the one here before the court. The Iowa legislature evidently intended to phoribit the practice of the healing art by the use of medicine or any kind or appliance of methods, except on certain named conditions. The language used is very broad and comprehensive, and covers any and every kind of public profession to cure and heal by the use of any method or device. It confines the practice of medicine to the school or schools regarded as lawful, and does not permit quacks and charlatans to impose on the public. The charge against the defendant was that he was practicing as an itinerant physician without the required license, and it was unimportant, the court says, to inquire as to whether or not he had a state certificate, as this would afford him no protection. There ay be some doubt as to whether a non-resident may obtain this certificate, maintain his residence in another state, and practice his profession in Iowa without obtaining the additional license required by section 2581 of the Code. But as to this the court expresses no decided opinion at this time. As to the contention that the license tax is unreasonably high, oppressive, and prohibitive, the court says that, being in the nature of an occupation tax, the state undoubtedly had the right to fix it at such sum as it saw fit. While the practice of medicine is often spoken of as a right, it is not, strictly speaking, a right, but a mere privilege, upon the exercise of which the state may impose conditions such as it deems advisable. The title of the act is "Of the practice of medicine," and, the court says, the subject-matter is sufficiently expressed. It was error to sustain a demurrer to the indictment.

WHO PAYS DOCTOR?

The question of a father's financial liability for an operation which was performed upon his son without his consent will be passed on by Judge Sutherland in the appealed case of Newton M. Collins against John Meyer, which was argued yesterday in County Court, Rochester, N. Y.

Mr. Meyer's boy, Albert, was injured while at work on April 2, 1903, at the Machine Screw Works. Afterward the lad was taken to the Homeopathic Hospital. His father was later notified of the accident. By mistake he went to the City Hospital to see his son. When he reached the Homeopathic Hospital, Mr. Meyer found his boy under the care of a nurse. He decided to leave him there and went down to see the superintendent with whom he entered into an agreement to pay $7 a week for the care of the son during his stay at the hospital.

After Mr. Meyer left the hospital the boy was taken into the operating room and operated on by Dr. Collins, plaintiff in the action. About a year afterward a bill for $75 was sent to Mr. Meyer. Some time later Dr. Collins brought an action in Municipal Court to recover the amount. Mr. Meyer, through Attorney Charles F. Young, fought the case on the ground that he did not authorize the operation and was never informed that it was necessary.

Dr. Collins was defeated in this action and appealed to the County Court for a reversal of the judgment. Arguments on this appeal were heard yesterday Attorney Young in his argument maintained that where the case is not in extremis and the parent is accessible and the physicians do not choose to apply to the parent or take care that his assent is obtained the services rendered by a physician for an infant must be deemed gratuitous. He further contended that it was the duty of a physician under the circumstances to show an absolute necessity for the immediate rendition of the service and to further show that the parent is inaccessible. Mr. Young cited a number of cases in support of his contention.

Milton E. Gibbs, appearing for Dr. Collins, maintained that the parent was responsible for the operation, even though it might have been performed without his consent. He contended that the boy was unable to authorize the operation, owing to his age, and that it was absolutely necessary.

The decision in the case will be awaited with much interest by physicians generally, as well as all persons who have had or may have occasion to undergo an operation.

A SURGICAL OPERATION MADE BASIS FOR A SUIT.

A jury in the Supreme Court in session at Long Island City must determine the all-important question whether or not a patient can collect damages from a surgeon for the failure of an operation. The question is involved in an action instituted by William Grussell, 21 years old, of Rockaway, against Dr. Virgil P. Gibney, surgeon, of New

York. The plaintiff asks the jury to give him damages amounting to $80,000, on the ground that the failure of a surgical operation performed by Dr. Gibney had made him a helpless cripple for life.

Justice Keogh is presiding at the trial of the case, and each side expects to call prominent surgical experts before the trial ends. Dr. William T. Bull, of 35 West Thirty-fifth street, Manhattan, was a witness for the defense yesterday afternoon, and Dr. John Walker, another surgeon, was the first witness called this morning.

The complaint in the case sets forth that William Grussel on or about December 1, 1902, called with his mother to see Dr. Gibney. The surgeon resides at 16 Park avnnue, Manhattan, and with Dr. Bull, is interested in a private hospital in East Thirty-third street, Manhattan. According to the complaint Grussell claims that Dr. Gibney entered into a contract to operate on his left foot, which was what is known as a "club foot," and that the surgeon guaranteed a permanent cure for $50. The complaint further sets forth that the operation was not a success and that subsequent to it the patient had to submit to the amputation of most of his left leg, and that he not only suffered great pain, but was helpless for a long time, and unable to do anything to even contribute toward his support, and that since recovering he is a cripple and unable to earn his own living. Grussell is represented by the law firm of Wilder & Anderson, of Manhattan.

Dr. Gibney, through his attorney, Sol. L. Youngentop, put in an answer admitting that the operation took place, but denying in most emphatic terms that there was any understanding or agreement about a cure, or that there was any neglect or oversight on his part that would have improved the patient's condition or made a cure more certain.

The plaintiff's case did not take very long and when the defense opened Dr. Gibney was called to the stand. He testified that the plaintiff called at his office and the operation was arranged for, and performed by him, and that every care was exercised. He denied very positively that he made any agreement about the case, or that there was any understanding other than that he said that there would, of course, be a certain element of danger in the operation.

The surgeon was cross-examined at length as to the details of the operation. He described the opening of the wound, and the removal of pieces of bone, and the dressing of the wound, and when asked if the surgical instruments and bandages used in the operation had been properly sterilized, he replied that he did not know, as such things were left to assistants chosen for their competency and reliability. He was asked about the cotton used in binding up the wounds and how much was required and answered all questions promptly, but when it came to a question as to the medical treatment of the cotton, he sad he did not know whether it was setrilized or not, and did not care.

"What did you put outside of the linen bandages?" asked the counsel for the plaintiff.

"A plaster of Paris bandage," was the answer.

"Who applied it?" was the next question.

"I did myself," was the witness' reply.

"Do you know if the plaster was sterilized?" asked the lawyer.

Dr. Gibney smiled and then he said he did not know and did not care.

That closed the cross-examination and his own counsel in re-direc examination asked the surgeon if microbes could live in plaster of Paris. Dr. Gibney replied that he did not think they could, but that he was not very familiar with the construction of the plaster.

Dr. Earnest C. Gibney, a brother of the defendant, was the next witness. He was an assistant to his brother in the office and corroborated the defendant respecting the visit of Mrs. Grussell and her son. The witness testified that his brother asked $350 for the operation and that Mrs. Grussed had said that her circumstances would not permit her to pay such an amount as that.

"Dr. Gibney talked with her for a time," said the witness, "and finally agreed to perfrm the operation and administer treatment only up to the time the patient should leave the private hospital for $50.

Dr. Earnest Gibney was called from the stand in order that Dr. William T. Bull could be called, as Dr. Bull was anxious to get away. Dr. Bull kept on his kid gloves until he was sworn and then he removed them. Before he took a seat in the witness chair Judge Keogh shook hands with the physician. Dr. Bull testified that he was both financially and professionally interested in the private hospital where the operation took place. He stated that several weeks after Dr. Gibeny had operated on William Grussell he called at the hospital and saw the patient and examined the wound and found it healing nicely and the patient in a very satisfactory condition.

Dr. Bull seemed a little annoyed over his cross-examination, for several times he did not give direct answers until the questions had been asked twice.

Dr. Bull testified that he saw Grussell by daylight and that he was within three feet of the patient and had him under observation for about five minutes and found his condition very satisfactory.

"Doctor, if you had a patient and found on removing some of the plaster bandages from a wound that the edges of that wound were inflamed, would you not consider that the wound had become infected?" asked the plaintiff's counsel.

"No," replied Dr. Bull, very sllowly, "I would consider that the wound had become slightly inflamed."

Counselor Youngetop asked Dr. Bull a few questions on re-direct examination and one was as to how a wound could become infected.

A "wound might become infected from microbes in the air getting in under the skin or through the opening of the wound or from being brought in contact with any article that might contain infection," was the reply..

Dr. Bull said that surgeons did not worry about whether the instruments were sterilized when an operation was to be performed, as that was left to assistants chosen for their care and reliability, and as for bandages and cotton, they were always purchased from firms they could depend upon.

There are several trained nurses to testify, besides the surgical experts, but the counsel hope to conclude the case this afternoon.—*Daily Medical.*

[Ed.—The above suit was decided in defendants' favor.]

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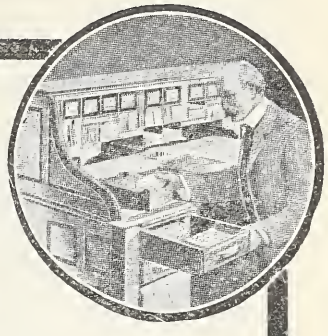

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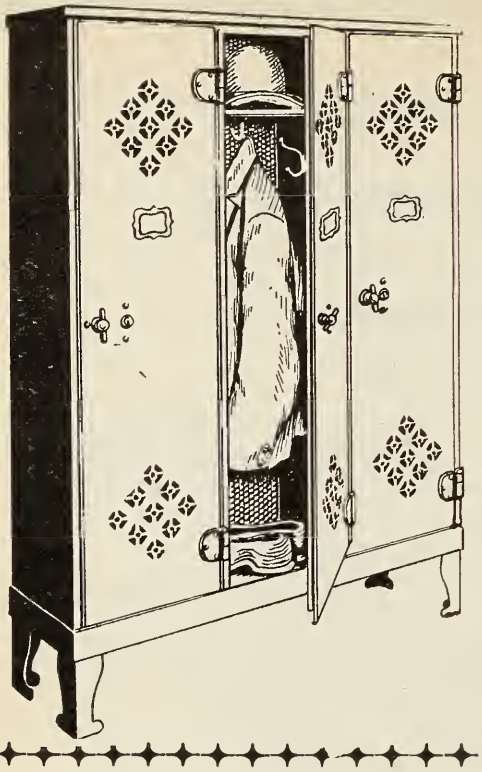

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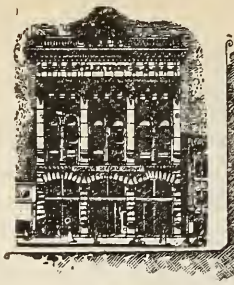

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This contract shall not lapse at the end of the time as stated above if the holder hereof shall pay the annual consideration in advance at the Home Office in Fort Wayne, Ind., or to an authorized agent of the company, in exchange for the company's receipt, signed by the president and secretary and countersigned by the agent, but shall continue in force for the term or terms for which such annual consideration shall be paid; provided, however, that the liability of the company under such extension shall not be cumulative.

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THE EDUCATIONAL FUNCTION OF THE PHYSICIAN.

By F. S. Roby, Indianapolis.
Member of the Appellate Court of Indiana.

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Every human being has his moments of inspiration. There is nothing that ennobles and prolongs them as does the realization of the fact that others are weaker than he, and that those weaker dependent ones are clinging and looking up to him. Many a man faint-hearted and weary has lifted the burden of discouragement from his soul by a single glance about him. "If I falter and fail how may these halting and helpless ones continue to fight?" And thus it is that dependent weakness becomes the very essence of self-reliant strength.

Rules applicable to men individually are in a broad way applicable to mankind collectively.

Appreciation of human brotherhood is increasingly keen. The disciple of selfishness is an alien to the high impulse of the age. What profession which offers the greatest opportunity to those who follow it is entitled to primacy among the profession. Such primacy at this time must be conceded to the investigating, intellectual, scientific men who are eligible to membership in such societies as this.

There was a time when the clergy monopolized the field. Those accused of crime were denied counsel, and those stricken with illness died or lived according to the supposed "will of God." That time is, however, past. The clergyman is learning what the layman by force by force of his own intrinsic common sense came long since to vaguely feel and later to understand, that theology is not religion but frequently its antithesis. The influence and standing of a clergyman depend, among us, upon what manner of man he is, upon what manner of thing he does.

Comparisons are proverbially odious; they are also, in many ways, impossible. I shall not knowingly disparage that profession within which my own work lies. It has stood and still stands for human liberty and equal right, and in the unyielding integrity and patriotic devotion of the bar is found a sure guaranty for the maintenance of republican institutions and free government. But these things depend, after all, upon the physical and mental characteristics of those who make up the population of a country. Men of sound bodies and minds will create for themselves such government as they need, and construct such institutions as may be required for the expression of the religious instinct implanted in them by the Creator. To a debased and corrupt people neither law nor religion avails and so the solution of our complex problems, social and economic, depends upon the character and quality of the individual citizen of the commonwealth, which character is largely a matter of education, that of the subject to be educated in turn depending upon the education of those responsible for his existence.

The scientific research and discovery of the last thirty years has been prosecuted and carried on by those who in a general classification must be placed in the medical profession, many of them being, of course, specialists in the extreme sense. This research and this discovery make it possible for the minister to teach a purer religion, for the lawyer to construct and conduct a better government. Further research will come from the same source.

In the olden time knowledge was regarded as a thing to be kept from the vulgar. Its possession hung a cloud of gloomy superstition over the world and the multitude did homage to them. Those who had power, warriors and kings, were content to share results and aided to continue the delusion. No such conspiracy now exists. The scientific humanitarian brooks no restraint and hides no useful fact. The value of truth is increased in geometrical progression by communication, and therefore the duty of the day is to carry truth everywhere and to every one,

I do not think that there can be much dissent from these general propositions. The practical questions is how to best carry the truth to the people? In this task, as in the prior and continuous one of discovery, your profession must lead. It must lead because it can. It can lead because it knows the facts of which others are ignorant. And if, because of that ignorance, the truth is more slowly perceived than it ought to be, still greater is the duty to point it out. It can lead because it has the confidence of the people, knowledge of their necessities and familiarity with their modes of thought.

Lawyers long identified with the affairs of a community, participating in and advising almost every business transaction, consulted by those troubled in domestic and personal relations, get a firm hold

on their client's confidence; ministers coming in contact with humanity while it is in the valley of despair know of its longings for immortality and its need for comforting assurance; but it is to the doctor and to the doctor alone that the door of every closet is unlocked and the hidden skeleton brought out. To him the high and the humble, the priest and the layman and the lawyer all come for help and confession. Touching thus the inner life of every man, power to mould sentiment such as the writer of ballads never had in years gone by, is yours, and therefore in the sight of these weak and timid ones you may not hesitate and you may not fail. The consciousness of responsibility ought to abide in the doctor's heart forever. The power of life is almost his and the shadow of death is never far. Who can be indolent when there is so much to do!

If every person in the profession appreciated the responsibility devolved upon him by his occupation, and the confidence of which he therebv becomes the recipient; if each one were to subordinate his grosser instinct to the catholicism of service, no door would be long shut to truth.

The practical question is how to bring your membership up to grade, to give it the right fibre, and to increase its consciousness?

I am writing no indictment. The best men in the world are doctors, but so are some of the worst ones; the wisest men in the world belong to your profession, and some of the most ignorant ones practice it. Those who are absolutely vicious, the abortionist and his kind, must be treated as other enemies of the human race, visited with the penalties of the criminal and social law; but they are not the men who compose the rear rank. It is composed, not of the intentionally vicious, but of those who if ignorance were an excure, would always have a defense. In this rank are found those who refuse to report births and deaths, or do so with grudging inexactness; the disciples of Cuban itch; those whose patients never have any contagious diseases; those who stand for the glory of their town by asserting that there is not and never has been a case of smallpox in it; who diagnose all sore throats as tonsilitis and congratulate the parents over the possession in the family of membranous croup and scarlatina, when it might have been so much worse. Think of a doctor in this age of antiseptics binding a mangled arm in commercial cotton-batting procured from a dry goods store for that purpose; or imagine him going from scarlet fever to the lying-in bed. There are many shades of this miserable incompetence manifested every day—horse-trading, interest accumulating, plaesure-seeking M. D.'s, who ought to have been born in the dark ages, or better yet, never have been born at all.

So far as the law making power is concerned about all has been done in Indiana that would appear to be necessary. The system of registration and examination is an execllent one. There should be

no relaxation in its enforcement, the ultimate result of which cannot but be advantageous. But nothing can take the place of public education which is not progressing with an unexampled rapidity. It will not be very many years until we will take acre of your laggards and incompetents ourselves. It is indicative of the trend that the present test of public economy involves a consideration of value as well as cost.

Human credulity has always afforded and will always afford a fruitful field for imposition; a field which is not often allowed to lie fallow. The charlatan of the long hair is a menace only as the gold brick man is a menace. No one particularly sympathizes with his victim, it being merely a case of the fool and his money.

The patent medicine imposition is mose serious. I do not regard the sale of proprietary remedies as a thing to be prohibited. The vice lies in the false statement by which such sale is induced. We have a statute declaring that: "Whoever with intent to defraud another, designedly, by color of any false token or writing, or any false pretense * * * obtains from any person any money * * * shall be imprisoned in the state prison not more than seven years nor less than one year, and fined in any sum not more than $1,000 nor less than $10."

It never seems to have occured to any one that the patent medicine manufacturer could be affected by such provisions as this. Take for illustration the widely advertised remedy known as Liquozone. This remedy is sold upon the representation that the essential process in its manufactuure consists in the generation of oxygen which is confined under pressure, and by a secret method by the employment of immense apparatus and fourteen days' time, is made part of the liquid product; that it is not made like medicine by compounding drugs; there is no alcohol in it; that its virtues come solely from the gases used in its manufacture; and that it will cure fifty diseases enumerated, including Bright's disease, consumption and cancer, together with many others not specified.

This latter declaration may be treated as an expression of opinion, but with regard to the constituent elements contained in the medicine there can be no room for mistake. An analysis published in the September 3rd number of the *American Medicine* shows the ingredients of this mixture ot be:

Water	98.61%
Sulphuric Acid	1.05%
Sulphurous Acid	.28%
Hydrochloric Acid	trace
Fixed residue	.06%

The report adds: "The above data shows that the material called "Liquozone" is composed of water to which sulphurous and sulphuric acid have been added. Hyhrochloric acid is probably due to pre-existing chlorides. The fixed residue comes from the fact that the

water is not distilled. There appears to be no justification whatsoever for the claim in the advertisement relating to this simple mixture. The cost probably does not exceed one cent per gollon."

This is a typical illurtration except that the danger in using the article is not so great as in using many others.

Some measure of protection can be procured hy the enactment of a law providing that no patent or proprietary medicine shall be sold unless the formula therefor is printed upon the label in large and legible type, and that a failure to so print such formula, or a false statement therein as to any ingredient, or the amount thereof, shall be a misdemeanor subjecting both the manufacturer and the person selling or offering to sell such medicine, to punishment by fine or otherwise. Such measures would undoubtedly cause the medicine buying public to consult dictionaries and dispensatories more than they have heretofore done and relieve the drug store shelves of a considerable amount of waste material.

But it is not my purpose to discuss details. Annoyances and discouragements lie along the way we go.

"Yet I doubt not through the ages one increasing purpose runs,
And the thoughts of men are widened with the process of the sun."
"Men, my brothers, men the workers, ever reaping something new;
That which they have done but earnest of the things that they shall do."

THE MIDWIFE PROBLEM AND ITS LEGAL CONTROL.

By Guy Steele, M. D., Cambridge, Md.

When I undertook the preparation of this paper I expected to call attention to the need of some practical and drastic legislation regulating the practice of midwifery, fortifying the conclusions reached by a recital of what other States had done in this respect. To my surprise, in searching the literature, I found that Maryland was but little, if at all, behind her sister States in ignoring this most important subject, and while this does not excuse our dereliction, it at least shows that we are not alone in our disregard of what I consider an important duty.

A Maryland statute of 1898 demands that midwives, or those attending labor cases for pay, shall register their names and addresses with the county health officers, and also provides that cases of childbed fever shall be at once reported to the health officer, and that no case of labor shall be attended thereafter until permission from the health officer has been obtained. For violations of either of these clauses penalties of fine and imprisonment are provided.

This surely is as litttle as could be done in the way of regulation or restriction, and yet one wonders how this much could have slipped into our medical laws and a complete ignoring of every other requirement remain. This small effort may do some good in letting the mid-

wives know that their hurtful potentialities are recognized by our law-makers, and that they are not altogether beyond the reach of the law, as they were for so many years. I have not heard that any attempt at enforcing any of the provisions of this law has ever heen made. I hope that what I say may lead to some discussion of the question and lead to the introduction of some bill at our next legislative session correcting this most serious abuse. The almost complete absence of any systematic attempt to regulate the abuses of midwifery amounts to an indictment of our profession. The matter is fairly up to us. The question is, "What will we do with it?" for ignore it much longer, we cannot. In England bills have been presented to Parliament demanding evidence of some obstetrical knowledge obtained by attendance on a stated number of cases and tested by an examination covering the more practical requirements of anatomy, delivery, and attendance post-delivery. For years successive bills of this character were defeated but recently a bill has passed. In the States of the German Empire, as might be expected, strict laws, rigidly enforced, surround and govern this profession. A regular course of hospital instruction, with difficult and exhaustive examinations, are provided. License is hard to obtain, highly prized, and jealously guarded. The same maye be said of France Just why so little has been done in this country is hard to say, and it is still more difficult to see why the little attempted has almost always been defeated. The readiest explanations are the lukewarm interest and half-hearted advocacy of our profession and the well-known antagonism of all lawmaking bodies to anything offered or supported by the medical profession. Almost any legislation proposing anything and demanding anything can be safely piloted through our legislative chambers by an actively interested industry or clique, but let a bill be offered by our profession, no matter how beneficient to the general public, no matter how free from every possibility of material profit to anyone, and instantly the solons see a snake in it, and fight it either to death or at least to impotence.

Objection in times past has been raised that we will be legislating fees out of our own pockets and raising a formidable opposition to ourselves in one of the most profitable branches of our calling. This is not the case, for the reason that the more we educate the public to the value of skill and science in attendance on childbirth the more surely will the public demand the best that science and experience can offer, and no matter how well we train them we can hardly expect to see the day when midwives can meet us on equal ground. No matter, though, if some of us do lose fees, this is no reason why we should not do our duty, and by the majority of the profession at large the pecuniary argument will not be considered. It has been the glory of medicine that every advance in scientific discovery, every step forward in the treatment of disease, every improvement in surgical technique, has been

made solely with the purpose of better serving and better helping fellow man. The whole story of our sacrifice of self-interest is summed up in the words "preventive medicine." Every tubercolosis commission, every board for the establishment of water-works, every health board, every health officer, is the enemy of commercialism, and we have ever been foremost in every enterprise that promised improvement in health conditions or prolongation of human life.

Why then do we allow this midwife problem to remain unsolved, and why, in the time of greatest need, should we leave mothers and infants to the tender mercies of ignorance and superstition, so gross in many instances as to rival voodooism?

This last assertion may not appeal to our city brethren with all the force that it does to those who practice in the counties and are in daily contact with the negro race. That physicians practicing in the poorer districts of the cities have their occasional trials I am well aware, but I speak only fairly when I say that the midwife problem, as a problem, is always before the country doctor. The city man is in reach of trained assistance. The nurses' homes and clubs, and medical institutions can at all times be drawn upon, provided the patient can pay. With the country doctor the question is different. No matter how anxiously he wants an obstetrical nurse, no matter about the pay, he is in most cases, and especially in cases to which he is called hastily, unable to obtain any better assistance than a local midwife. Imagine the feelings of a man who faces a difficult case in the country without a consultant, interference with natural delivery being imperative, an anesthetic to be given, and the only assistant a negro midwife. Delivery is in most cases accomplished safely; careful instructions are given covering all contingencies likely to arise, and the case is left to the mercies and intelligence of the nurse.

The post-partum period gives unending anxiety. He is 10 miles away, and can only see his patient once a day, perhaps once in two days. What attention is paid in his absence to the rules he has given about cleanliness of the patient's person, midwife's hands and dressings, about the breasts, the diet, the baby's eyes, mouth, and cord? In more than half of the cases no attention is paid to anything but the effort to get through every duty with as little physical exertion and as little expenditure of time as possible. When the physician's back is turned the reign of the midwife begins. This product of 40 years' experience was delivering women long before the doctor was born, and her cases got along without such foolishness as the washing of hands at any time during delivery or after delivery.

From recent personal experience I may say that the good soul is still plying her art who, a few months ago, grabbed her hat and coat and left the house in a fit of indignation because I reprimanded her for taking advantage of my momentary absence from the room to rup-

ture the membranes. She told me that she had learned her business at the Johns Hopkins, and knew "as much as any doctor, and a great deal more than some." Another, recently gathered to her fathers, when I attempted to explain in a commencing labor the necessity for sterilizing her hands, informed me in a most injured tone that her hands were perfectly clean, "as she had been in the washtub all the morning." This was at 6 P. M., and when I returned to the house later in answer to an urgent call I found her rocking calmly by the window, crooning to herself while dressing the baby which had been born during my absence. An examination of the mother revealed the placenta lying partly in the vagina, the uterus extending nearly six inches above the umbilicus, immensely enlarged in all diameters, soft and boggy; a pulse almost imperceptible, lips blue and face blanched A little more delay and a fatal result would have been inevitable.

There is another midwife still with us who for fifty years has been "waiting on only the best ladies of the town." Her specialty is the baby's scalp, and her first inquiry is whether there is any whiskey for the baby's head. If there is, several ounces invariably go to enliven her melancholy soul, while drops find their way to the baby's scalp. Under her skillful management I had one of the most trying experiences of my obstetric practice. Having safely delivered a primipara after a long and trying labor, I had every reason to expect a speedy and uninterrupted recovery. As some blood clots were passing, I had ordered a vaginal douche in the morning and cleansing of patient with soap and water whenever pads were changed. To avoid the trouble of giving the douche my nurse suddenly developed a case of rehumatism in her shoulder, so painful that she could not lift the douche bag to a nail above the bed. Supposing that she had at least performed the perineal toilet, I had not made examination at my next visit, as I was informed that the lochial discharge was normal in color and odor. One morning I found a temperature of 102F. and pain in urinating, and on a vaginal examination an almost indescribable condition was found. I was then told by the patient that the only attention that she had received was a slight dab of water each morning, and that the nurse had assured her that she was doing well and that my instructions were being faithfully carried out. A cystitis resulted, infection passed up the ureter to the kidneys, and for months I struggled with a pyonephosis. Good natured, fat, asthmatic, black "Aunt Lonzy" still offers her services to the "best ladies in the town." When in need of a perineal pad or napkin she delves in a dark corner or dusty cupbuard and fishes out an old calico skirt or petticoat, which, being good for nothing else, is just suitable for such use. A short time ago I saw one of her cases with a temperature of 105 F., and a discharge with terrific odor. I was informed that her experience had demonstrated and she had always been taught, that the bloody nightdress, blood-

soaked bedding, and the originally used napkin must not be changed, nor must the patient be bathed for three days following delivery.

I might go on indefinitely, but these illustrations, familiar to those who practice in the country, are enough to show the dangerous capabilities of the average midwife in the rural districts. It is a satisfaction to know that people are becoming better educated and that both doctors and midwives are held to stricter accountability. The day when a doctor prescribed a fried toad for jaundice, and the people took it in all faith and gratitude, is gone or fast going, and the same may soon be said of the autocratic sway of the midwife.

The former requirements for a midwife were an age of 50 years or more, a laziness that scorned regular occupation, a disregard of pain and suffering, and ability to stand the sight of blood.

In these days midwives are expected to know something of obstetrics, or, at least, to know their own limitations and enough to call medical assistance when danger threatens in delivery or post-partum. This much would be a great gain, and in this even partial enlightenment of the people we might see some hope of solving the midwife problem.

The question before the profession is, What can we do and what can the State do to correct the present abuse? We, ourselves, can do much to help educate those we have now with us. It is my custom in all cases to explain to my nurses the necessity for and the process of hand sterilization, the methods of cleansing the vulva and perineum, the preparation of bed and dressings, the plainer features of presentation, descent and delivery. I instruct them as to the signs of hemorrhage and the significance of uterine expansion and bogginess, how to knead the uterus and keep it contracted. Plain rules for diet and infant-feeding are given, and for the care of the baby's eyes and cord. It is needless to say that the instructions given are suited to the intelligence of the nurse. While it is frankly confessed that much of the seed falls on barren ground, the point is that something may always be taught, and that it pays to do it, especially as the instructions are given while the case progresses and no time is lost.

What now of legislative enactment? It will be difficult to pass a suitable measure for two reasons. In the first place, such a bill, in order to pass, must be absolutely devoid of any suspicion of gain to our profession. In the second place, it will be hard to frame a bill that will improve the situation and still be so simple and practical that its reqiurements can be met by the class of women who will present themselves as candidates for license. This is the crucial point. If the future midwives were to be drawn from an even fairly-educated class, the problem wonld present few of its present difficulties.

We all know, however, that for the present and for some time to come, our source of supply must be the negro women. We rarely find

a young midwife. My experience is that not one in ten is under 50, and few of this race over 50 are capable of training any that requires more than a rudimentary education. We must be content with an humble beginning, and as the people learn to appreciate the value of legal supervision, the requirements for license should be increased. I am convinced that if we make a start the problem will work itself out. We should begin by enforcing the existing law requiring registration of midwives and those who attend cases of labor for pay. Let the few who refuse to come forward be fined, and all who intend to follow the profession will flock to the clerk's office or else go out of business. I know this to be so, for many former midwives have given up their business rather than go to the small trouble of making monthly returns of births. We should be able to fix a day, say a year later than the act of assembly, after which all who propose to begin the practice of midwifery must obtain a license by passing an examination. This examination should be plain and practical, embracing only the knowledge which is practically indispensible. The details should, as is now the case with medical emaxinations, be left to a board of examiners. The enforcement of the law should be placed in the hands of the executive officer of the State Board of Health. Violations of the law would first come under the notice of the county health officer, and it should be his duty to report the facts to the secretary of the State Board. As possible candidates are in most cases unable to go to the medical centers to attend lectures, the lectures must be brought to them. A combined board of lecturers and examiners should be appointed, say one man for each of three counties for the State at large and a suitable number for Baltimore City, who should meet and formulate a set of examination questions for the whole State. The lectures should be so arranged as to cover the questions for next examination. Each lecturer and examiner should twice a year visit the county seats of the counties under his charge. Just before each series of lectures an examination should be held covering the ground gone over in the preceding course of lectures. A certificate of proficiency should be given to those who pass, stating that they have attended one course of lectures and are now entitled to attend cases of labor (but not for pay) under the supervision of some physician. The last course of lectures should cover the practical side of obstetrics and the final examinations should test the ability of the candidate to manage cases of normal labor on her own responsibility.

It is evident that this is a mere summary. The details must be worked out in part by those who are able to draw up a proper bill and in part by those who are entrusted with its enforcement. As I said in beginning, my hope is to arouse sufficient interest to bring about an effort to solve the question. The cry for relief has long gone forth. Can we not answer it at the next session?—*Maryland Medical Journal.*

DUTY OF INJURED PERSON.

The Supreme Court of Illinois says, in Chicago City Railway Company vs. Saxby, a personal injury case brought by the latter party, that it was the duty of such party to use reasonable care to effect a speedy and complete cure of the injury which she sustained by being thrown on the street from the company's car, and to that end, she was required to exercise reasonable care to employ physicians of ordinary skill and experience to treat her, and other means to effect a cure of her injuries. She was not, however, required to employ the highest medical skill which might be found. All the law required was that she exercise such prudence as men and women of ordinary judgment, under like circumstances, would exercise in the choice of physicians and the means to be used to effect a recovery. She was not an insurer, bound to act at her peril; and if she exercised reasonable care in selecting her physicians, and in the employ of other means for her recovery, if her physicians made a mistake in the treatment applied by them to her, or by the means employed failed to effect a cure, then she might recover for the entire injury which she had sustained, as the law, if the injured person uses ordinary care in selecting a physician, and in the employment of other means to effect a cure, regards an injury resulting from the mistake of a physician, of from a failure of the means employed to effect a cure, as a part of the immediate and direct damages which naturally flow from the injury. If it be conceded that she had tuberculosis in her system, and that the same was developed in the knee by reason of the injury thereto, or from the treatment she received in the endeavors made to effect a cure of the fracture of the neck of the femur, it could not be said that the diseased condition of the knee was not a consequence which naturally and ordinarily might not follow as a result of the injury caused by the negligent act of the company.

WHEN CERTIFICATE OF DEATH IS COMPETENT EVIDENCE.

The Appellate term of the Supreme Court says, in the case of Carmichael vs. John Hancock Mutual Life Insurance Company, that the certificate of the attending physician, when made a part of the proofs of death, is competent evidence on the trial as an admission against interest (Donnelly vs. Ins. Co., 43 Misc. Rep. 87; Hanna vs. Ins. Co., 150 New York 546); and the cases that hold which such a certificate, when offered as such, without the characteristics of an admission by the plaintiff, may be excluded as privileged (Robinson vs. Supreme Commandery, 77 App. Div. 219; Davis vs. Supreme Lodge, 165 N. Y. 159), do not apply. Where the certificate has been delivered among the proofs of death, its character as proof is derived from not what the physician declared, but from what the plaintiff has admitted to be the fact, i. e., the cause of death, and the privilege which she might assert to exclude the evidence of the physician does not extend to evidence of what she has herself admitted.—*J. A. M. A.*

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THE SURGEON'S HEART.

A poor man from the West had been treated by his club doctor—a busy, overworked, good-hearted fellow—for glandular swelling in the neck. The merest chance broughet the patient to London, and a concatenation of coincidents led to his meeting a St. Thomas' Hospital surgeon. "You come up to the hospital said the latter. You've no glandular swelling there." The poor fellow went. They looked him over. That suppositious glandular swelling was a thyroid abscess of a particularly malignant form. The man, seemingly so healthy, was what an insurance acturay would term a 10-minute life. "Can you come in?" they asked him. He consented. Sir William MacCormac took him in hand. "This is the most delicate of operations," he said. "Will you trust us?" He would. In due course, before quite a gathering of surgical notabilities, Sir William operated. The case was as bad as it possibly could be, and the faintest fraction of error would have meant certain death; but the operation was perfect, one of those performances of which we laymen never dream, but which these inspired giants in life saving at the hospitals are accomplishing every day of their splendid lives. Next morning, before seven o'clock, the patient was gently roused from sleep. He opened his eyes and saw the strong kindly face of a man beaming in delight upon him. It was the great and wealthy surgeon, who had left his bed before six o'clock that bitter morning to come to see this poor, friendless man from the wilds of the West. The patient is a hale man today, and in his part of the world they regard St. Thomas' Hospital as a temple of miracles far more awe inspiring than any holy well.—*St. James' Gazette.*

A PRIVILEGED COMMUNICATION NOT PRIVILEGED.

By E. S. McKee, M. D., Cincinnati.

Having supposed that communications to physicanis, attorneys and the clergy were privileged, I have at this late date found that it is not always so. A dapper young dandy tripped into my office one day and with surprising honesty said: "My wife has the clap, I gave it to her and I want yon to come and treat her." I went; found his diagnosis correct, and conducted the case to recovery. Being just married (it is only the newly married who tells his wife secrets) he allowed her to learn what he had told me. Shortly afterwards they moved to St. Louis, and, wonderful to tell, forgot to pay me. A few years later a still stranger thing happened. They each began to pay me in installments of $5.00 each. They kept about neck and neck, and I kept still. When both had paid in full I returned the wife's money to her and kept his. Later the anxiety of both to pay the bill was explained by the filing of divorce proceedings on the part of the wife. I received notice from a very youthful and apparently important notary to come and give my deposition in the case. I went, but declined to tell what the husband had told me about infecting his wife, claiming privileged communication. I was dismissed to give him time to communicate with St. Louis. This proceeding was repeated five times. The fifth time a constable was called and I was placed under arrest, and told by the august youth that I would have to go to jail and remain there till I was willing to testify on this point. I advised him not to send me to jail, which counsel he seemed to think wise, and told me if I would promise to appear before Judge Hollister the next day he would let me go. I promised. I appeared before the Judge, the case was argued and taken under advisement. I reappeared in a week, and the case was again taken under advisement. I was called a third time, and at the end ofthree weeks I was ordered by the judge to testify on this point. The argument was that the wife was the patient, the husband was not. The wife, the patient, wanted the testimony given; hence I was ordered to give it. Had the wife not wanted me to tell I would not have been allowed to tell. Still, the husband came to me as a physician, talked to me as a physician, asked me to treat his wife, giving me such information in confidence, as he thought I needed to best manage her case. Had I treated him I doubt if I could have been ordered to tell.

The law is, the doctor, lawyer or minister cannot be compelled to testify in court or elsewhere what professional knowledge he has about his patient, client or parishioner, unless he or she wishes him to do so. The great majority of attorneys with whom I spoke thought the judge's decision wrong.

Judge Hollister knows more about the law than I do, and probably gave it the correst interpretation, but if such is the law it should be changed. I should not have been ordered to tell what the husband told me about infecting his wife in confidence, relying on me as a physician to keep the secret inviolable.

RESPONSIBILITY OF AUTHORS FOR THEIR FORMULAS.

The Lyons courts recently acquitted a physician who had made an injection of 40 gm. of a 5 per cent. sulution of cocain with the consequent death of his patient. The operation was not for the relief of hydrocele, and the patient succumbed in twenty minutes after the preliminary injection of the cocain. The physician stated that he had merely followed the directions in Tillaux' Manual of Clinical Surgery, second edition, page 401, which advised for such cases an injection of "about 30 grams of a 5 per cent. solution of cocain;" that is, a gram and a half of cocain. In the third edition, which followed three years later, Tillaux warned against large dosed and advised "about 10 grams of a 1 per cent. sulution," that is, 10 cgm. The necropsy revealed pleural adhesions, which made any injection of cocain dangerous. The court acquitted the physician, stating that the citation from Tillaux' text-book freed him from responsibility. Professor Tillaux was president of the Paris Académie de Médecine at the time of his death last fall, which occurred not long after his legal decision. The *Journal de Med. de Paris*, commenting on the affair, remarks that the decision evidently offers a precedent for holding the author of a book or formula responsible if the application of his formula entails any mishap. It doubts, however, if this precedent will be accepted in jurisprudence, as any physician making such an injection ought to know enough not to inject 2 gm. of cocain under any circumstances. "Our confidence in the works of the masters should not deprive us of our powers of judgment." A similar case was recently decided in Georgia. The proprietor of a patent medicine was sued for injuries by a person who had taken the medicine. The court held that the proprietor was responsible and stated that after careful search not only in the authorities quoted by counsel, but in others, no record of a similar question having been determined by any court could be found. The court held further: "If the contents of a medicine are concealed from the public generally, and the medicine is prepared by one who knows its contents, and he sells the same, recommending it for certain diseases and prescribing the mode in which it shall be taken, and injury is thereby sustained by the person taking the same, proprietor would be liable for the damage thus sustained. * * * These proprietary or patent medicines are secret, or intended by the proprietors to be secret, as to their contents. They expect to derive a profit from such secrecy. They are, therefore, liable for all injuries sustained by any one who takes their medicine in such quantities as may be prescribed by them. * * * He has a right to rely on the statement and recommendation of the proprietor, printed and published to the world; and if, thus relying, he takes the medicine and is injured on account of some concealed drug or which he is unaware, the proprietor is not free from fault, and is liable for the injury thereby sustained.—*J. A. M. A.*

THINGS TO WHICH A PHYSICIAN MAY TESTIFY.

The Third Appellate Division of the Supreme Court of New York says, in the case of Becker vs. Metropolitan Life Insurance Company, where a policy was issued April 20, 1900, that the insurance company sought to show by a physician that on October 30, 1899, he was called to attend the insured in his professional capacity; also whether he at that time did so attend him; also whether he had any record of the dates when he attended the insured in Norwich or elsewhere; also if he remembered how long the insured was confined to his house in October, 1899; also to give the dates between October 30, 1899, and April 1, 1900, when he was called in to attend the insured, or when the insured called at his (the physician's) office to receive medical attendance from him. His answers to these inquiries were excluded on the ground that they were prohibited by section 834 of the Code of Civil Procedure. This, the court holds, was error. It says that neither of the questions called for information that was in violation of such section, while such information was manifestly pertinent to the issue being tried, and would doubtless have much weight in controlling the jury's verdict.—*J. A. M. A.*

PROMISE FOR TOWN TO PAY FOR PAST SERVICES.

The Supreme Court of Vermont says that in the case of Farmer vs. Town of Salisbury, brought by a physician, it appeared that, February 3, he was requested to visit a poor woman by a neighbor who promised to pay for that visit. The physician made the visit and informed the neighbor that the woman would require attendance for a long time. The neighbor declined to be further responsible, and by his advice the physician saw another neighbor, who tried to communicate by telephone with the overseer of the poor of the town, but, failing to do so, advised the physician to continue his visits, saving that he would see the overseer about the matter; but he did not see him until February 15, when he had an interview with him in the physician's behalf. The overseer then used language from which it was found that this neighbor understood, and had the right to understand, that the town would assume payment of the physician's charges, and that he so informed the physician. The trial court found that after the first visit the physician rendered his services in the expectation that the town would pay him, and, after this second neighbor's report to him, in reliance on such payment. The Supreme Court says that it was apparent that the overseer undertook to assume payment of the physician's entire bill, but there was no consideration for the promise to pay for the services rendered on the overseer's promise to pay, and did not inure to the town's benefit. Therefore, the town was not liable for them, but was liable for the charges made after that date.—*J. A. M. A.*

Judicial Decisions.

Under this heading will be presented each month information relative to judicial decisions affecting the medical profession.

POWER OF SCHOOL BOARD TO REQUIRE VACCINATION.

The Supreme Court of North Carolina says that the sole question presented in the case of Hutchins vs. School Committee of Town of Durham was whether the following resolution was a reasonable exercise of the powers of the school committee of the city of Durham: "Whereas, From the report and recommendation of Dr. N. M. Jonhson, superintendent of health of Durham County, in the judgment of this committee, general vaccniation of teachers and children attending the schools is desired and required for the public safety: Now, therefore, be it resolved, that no teacher or pupil be allowed to attend any school of the City of Durham after April 1, 1904, who does not present to the principal of such school a certificate of a physician of the city showing that such cteaher or pupil has been successfully vaccinated within three years from that time, unless such person has been vaccinated within ten days preceding the date he or shc presents himself or herself for such attendance, and this resolution shall be a permanent regulation of the schools." An epidemic of smallpox prevailed in the city of Durham and its suburbs last spring, not less than 1,000 persons being attacked, and the above resolution was passed as a protection to the 2,500 children in the schools of that city, the attendance in which had fallen off 40 per cent. by reason of the fear of contagion. These facts were averred in the answer and found to be true by the judge. In the judgment of the Supreme Court, the resolution was a proper and reasonable exercise of the powers of the defendant. This, the court says, was not a question of compulsory vaccination under legislative authority, but simply whether, if a child was not vaccinated, the school board could, as a precautionary measure, exclude all such from the school, by a resolution under the power given in the charter to "have entire and exclusive control of the public school interest and property in the town of Durham, prescribe rules and regulations * * * and do all other acts that may be just and lawful to conduct and manage the public school interests in said town." The plaintiff relied on Potts vs. Breen, 167 Ill. 67, that, in the absence of express legislative power, a resolution requiring vaccination as a prerequisite

to attedning schools is unreasonable, when smallpox does not exist in the community, and there is no reasonable ground to apprehend its appearance. But this court is not inclined to follow that authority. With the present rapid means of intercommunication, the court says, smallpox may make its appearance in anv community at any moment without any notice given beforehand, and incalculable havoc be made, especially among the school children, which can not be remedied by a subsequent order excluding the non-vaccinated. "An ounce of prevention is worth a pound of cure." Besides, that case was not in point here, where smallpox had been epidemic, and was still threatening. The language of the resolution making it "permanent" would not prevent its repeal if on the subsidence of the danger the school board of that day should deem it proper to repeal. If the action of the board was not sitisfactory to the public a new board would be elected who would rescind the resulotion. The fact that it would be dangerous to vaccintate the plaintiff's danghter, owing to her physical condition, would be a defense for her to an order for general compulsory vaccination, but was no reason why she should be excepted from a resolution excluding from the school all children who had not been vaccinated. That she could not safely be vaccinated might make it prefrable that she herself should run the risk of taking the smallpox but was no reason that the children of the public school should be exposed to like risk of infection, through her, or others in like case. Though the school children were vaccintaed, there were always some whose vaccination was imperfect and danger to them should not be increased by admitting those not vaccinated at all. Besides, a rule not enforecd to all alike would soon cease to be a rule enforceable at all.

LIABILITY FOR ATTENDANCE ON EMPLOYE AND ASSISTANCE.

The Supreme Court of Montatna says that in the case ofBond vs. Hurd, an action brought by a physician, the physician was called to attend a man who had been sent by the party sued to receive some of the latter's horses gathered in a certain county, and was injured in moving the horses by being thrown from one of them, and the plaintiff, finding him seriously injured, called in another physician to assist him. The cause of action included, besides the plaintiff's own account for medical services, an account for medical services rendered by the assistant physician, which had been assigned to him. The only evidence in the record on which agency could possible rest was that of two telegrams passing between another party and the defendant—a telegram of such other party to the defendant announcing that the man had been hurt, and asking if he would pay the "doctor's bill," and the defendant's telegram in reply, announcing that he would do so. The plaintiff saw this telegraphic answer of the defendant, accepted the offer therein contained, and acted on it. No direct authority was

given this other party to employ a physician, so that any agency on his part was implied from the telegrams. However, the court says no agency could be implied from these telegrams which would authorize this party to delegate to the plaintiff the right to engage the assistance of other physicians, and bind the defendant to liquidate their charges. The agent's power to delegate authority is statutory, in Montana; and the testimony did not disclose that this party referred to lawfully delegted to the plaintiff authority to employ an assistant, within any of the provisions of the statute. The court below took the ground that an emerency arose which justified the employment of the other physician. But, in the opinion of the Supreme Court, neither substituted agency nor emergency was sufficient to hold the defendant liable for the charges of the assistant physician. Presumptively, it says, the plaintiff, when he was employed, assumed that he was a competent physician and capable of taking care of the case for which he was employed without assistance. If he concluded that assistance was required, before proceuring the same it was his duty, if he desired to hold the defendant liable for the payment of the bills of an assistant, to communicate with him and obtain his consent to the employment. If he had the right to employ the other physician and make the defendant liable for his services, he would have a right to employ as many other physicians as he might have deemed necessary and compelled the defendant to have paid them all. Continuing, the court says that there would be very grave doubt as to the liability of the defendant to furnish to the injured man medical assistance on the facts disclosed in the record, aside from the above telegrams. The accident by which the man was injured may have arisen from his own personal negligence or from a direct violation of the instructions given him hy tbe defendant. The law is by no means settled that an employer is liable to furnish an employe with medical aid under all circumstances. Many courts of last resort have held that even a railroad company is not liable to furnish an employe with medical assistance in case of accident. There the work of the employe is at all time dangerous in its character, and the reason for holding the railroad company liable to furnish such medical assistance in case of accident is much stronger than it is when an individual employs another to perform a service which is not dangerous in itself. After an investigation of authorities, the court is of the opinion that the holding of the Supreme Court of Indiana in matters of this character is the correct one, and should be lollowed. That court, in the case of the Terre Haute & Indianapolis Railroad Co. vs. McMurray, 98 Ind. 358, seems to place the liability of a railroad company of the ground of emergency and urgent necessity. The case of Terre Haute & Indianapolis Railroad Co. vs. Brown, 107 Ind. 336, is also referred to, aad as a much stronger case than the one at bar. And the Supreme Court of Montana says that it is satisfied that the record

in this case failed to show any such emergency as authorized the employment of an assistant physician, or that the assistant physician was employed by any one having competent authority to that end.

PRIVILEGE EXTENDS TO ALL PROCEEDINGS OF JUDICIAL NATURE.

The Supreme Court of Michigan says, in the case of Dick vs. Supreme Body of International Congress, that the by-laws of the defendant order provide that its decisions shall be final and binding on every member and his beneficiaries, and that no suit shall be commenced by either against it. In this case use was made, over an objection, of an affidavit of a physician, consulted by the insured, to the effect that the latter had been sick prior to a certain date. Did the defendant violate a law which was prescribed for its guidance when it admitted in evidence the affidavit in question? The legislature has said: "No person duly authorized to practice physic or surgery shall be allowed to disclose any information which he may acquire in attending any paitient."

Section 10,181, Compiled Laws of Michigan of 1879: The proceedings were in their nature judicial, and there can be no doubt that the legislature had power to prescribe rules which it was the defendant's duty to observe. The statute is one passed for the sole purpose of enabling persons to secure medical aid without betrayal of confidence. Did the legislature, in passing the statute, which prescribes a rule of evidence to be observed in judicial proceedings, intend to permit this confidence to be betrayed in any judicial proceedings which it had the power to regulate? To impute any such intention to the legislature was to assume that it desinged to meet its manifest purpose. There is nothing in the statute to limit its operation to any particular judicial tribunal or to any particular class of judicial proceedings. We must therefore assume that it was intended to extend to all proceedings of a judicial character which the legislature had the power to regulate. This statute was, therefore, violated when the physician's affidavit was used as testimony. When the defendant rejected the plaintiff's claim because of testimony admitted against election, and which the law in positive terms forbade it to consider, there was a denial of the hearing to which the plaintiff was lawfully entitled. It was the defendant's duty to observe the law, prohibiting the use of this testimony. It was the plaintiff's right to have that law observed. This right and this duty were just as clear and obvious as if they had been expressly stated in the by-law which provided for the hearing of the plaintiff's claim. If such by-law had in express terms provided that this law excluding the physician's affidavit should be observed, no one would

for a moment maintain that a determination by the defendant in violation of such provision was binding on the plaintiff. The only distinction between the supposed case and the actual one was this: In the supposed case the provision for the observance of the law was expressed; in the actual case that provision was necessarily implied. This distinction afforded no gronud for the application of a different legal principle. The court thinks it may also be said that the statute in question not only forbade the use of the physician's affidavit as testimony, but by necessary implication forbade all judicial tribunals (including the judicial tribunal of the defendant) from determining controversies (at least without the consent of the parties) on such testimony, and that the law would not permit the defendant to retain the unlawful advantage obtained by violating its prohibitions.—*J. A. M. A.*

HOW TO RECOVER MONEY PAID ILLEGAL PRACTITIONER.

The Court of Civil Appeals of Texas says, in the case of Gaither vs. Lindsey, an action on a contract for the treatment of the defendant's wife, that, in order to recover money already paid for the treatment of his wife, the defendant would have to do more than to prove that the plaintiff was practicing medicine in violation of the law. Unless, in addition, the defendant could show that he was deceived and imposed on, he would not be entitled to recover back money already paid although the plaintiff could not recover anything from him, since the general rule would apply that money voluntarily paid cannot be recovered. If, however, the plaintiff in any way represented himself to be a practicing physician, when he was not authorized to practice medicine, and the defendant was thereby induced to employ and pay him for professional services, he could recover the money so paid.—*J. A. M. A.*

MAY GIVE CONCLUSIONS WITHOUT FACTS.

The Supreme Court of Iowa says that, in the case of Morrow vs. the National Masonic Accident Association, the only witnesses examined by the association as expertswere physicians who had either attended the insured in a professional capacity after his injury or were present and took part in the pos tmortem emaxination held. Yet before they were permitted to testify their conclusions as to the cause of death they were required to detail all of the facts on which such concusions were based. These rulings were, in the judgment of the Supreme Court, clearly erroneous, because every conclusion testified to was based on actual knowledge of the physical condition of the deceased, and, further, because the rule has never, to the knowledge of this court, been applied to witnesses who were in fact experts on which they were called to testify. But, notwithstanding the error in the rulings, it

must be held that they were without prejudice, because of the fact that in every instance the testimony was made competent under the rule of the district court and the conclusions of the witnesses received. Again, the Supreme Court holds that if there had been no conflict on the question of the cause of death the jury would have had no right to disregard the evidence of the physicians and find independently of it. But when there is a conflict in the evidence on a given point it is the general rule that the jury is not bound to treat the tsetimony of any witness as conclusive, no matter whether he be an expert or a non-expert.—*J. A. M. A.*

SUFFICIENT EVIDENCE THAT VARICOCELE RESULTED FROM INJURIES.

The Appellate Term of the Supreme Court of New York says that in the personal injury case of Bial vs. the Interurban Street Railway Co., the plaintiff testified that prior to the accident in question he did not suffer from varicocele, and, according to his physician's testimony this condition did not become apparent until a day or two after the accident. The physician further testified that, while varicosele is not ordinarily of traumatic origin, it is so in about 10 per centum of the cases, and in this he was corroborated by another physicain, a witness for the defendant, who testified that varicocele might result from injuries, but fixed the proportion of such instances at about 5 per centum of all the cases. The court says that argument apperaed to be unnecessary to demonstrated that this testimony warranted a conclusion that the plaintiff's condition was attributable to injuries sustained in the accident complained of.—*J. A. M. A.*

DAMAGES ALLOWED IN PERSONAL INJURY CASES.

The Third Appellate Division of the Supreme Court of New York says, in Jones vs. New York Central and Hudson Rivtr Railroad Co., that in cases of personal injury there is no rule by which compensatory damages may be computed with accuracy. The plaintiff is entitled to recover his reasonable expenditures for medical services, medicines and attendance, and also a reasonable amount in compensation for the pain and suffering occasionad by his injuries, and for the scars and deformities resulting therefrom, to which must be added a sum sufficient to compensate him for his loss of power to earn money. The verdict of juries and determintaion of courts in other cases can not be safely relied on as a rule or guide in determining whether a verdict is excessive, as each case necessarily depends on facts and circumstances applicable to or surrounding it. It is the province of the jury to fix the amount of the damages in each case, and it has been repeatedly known that the jury has been misled by passion or prejudice, or

coerced by some improper influence in fixing the amount of their verdict. Where it is plain that the amount of the verdict is out of all proportion to the injuries received, the court will assume that the jury misunderstood the rights of the parties or the effect of the evidence before them in determining the amount of their verdict, or that the verdict was effected by overpowering sympathy or improper influences. —*J. A. M. A.*

POWER OF SOCIETY TO FURNISH CARE OF A PHYSICIAN.

The Supreme Judicial Court of Maine holds, in the case of Flaherty vs. the Portland Longshoremen's Benevolent Society, that if a corporation or mutual association has for one of its lawul purposes the mutual aid and protection of its members, and has the power to raise and money for the payment of sick benefits to members, the power to afford relief to its members by furnishing them the care of a physician in time of sickness may be fairly implied from the general scope of the corporate purposes. But when one of the by-laws of a benevolent and protective society provides that "the funds of this society shall be appropriated for no other purpose than that necessarily incurred for the maintenance of wages, burying the dead and other incidental expenses," the payment of a salary to a physician is not thereby authorized, but is forbidden, although another by-law provides for the payment of sick benefits. When such a society by another by-law provides that "resolutions adopted at any general or special meeting of this society for any special purpose shall be as binding on its members as if they were embodied in its by-laws," it is held that by fair construction such resolutions are intended to have, and do have, the effect of by-laws when they are inconsistent with the by-laws, and do not have the effect of amending or repealing them. A society having such by-laws as those stated can not lawfully vote to pay a salary to a physician for the benefit of its members. To hold otherwise would be to give to such a vote the effect of amending the by-laws.—*J. A. M. A.*

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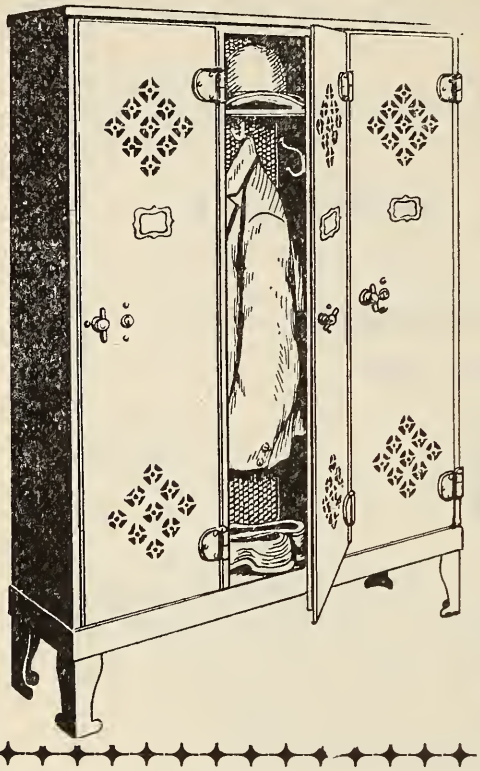

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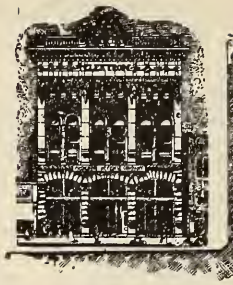

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(HEREINAFTER KNOWN AS COMPANY)

hereby agrees to defend the legally-qualified Physician,

_____ of the City of _____, County of _____, State of _____ against all civil suits for damages for malpractice, based on professional services rendered by himself or his agent during the term of this contract, at its own expense, not exceeding FIVE THOUSAND DOLLARS in defense of any one suit, nor exceeding in the aggregate TEN THOUSAND DOLLARS in defense of suits based on services rendered by the holder hereof, within one year from the date of this contract, or within any one year for which this contract shall be renewed, all in the manner and upon the conditions herein below stated, to-wit:—

Immediate notice by telegram, must be given the company at the Home Office at Fort Wayne, Ind., of any suit brought or demand made, and the holder hereof shall immediately forward the summons, or other process served, and the complaint or petition filed; together with a full and complete history of the case and services rendered.

Upon receipt of notice from the holder hereof that a suit has been commenced against him for damages for civil malpractice, the company will employ a local attorney in whose selection the holder hereof shall have a voice, who, together with the company's attorney, will defend the case without expense to the holder hereof.

Such defense will be maintained until final judgment shall have been obtained in favor of the holder hereof, or until all remedies by appeal, writ of error or other legal proceedings shall have been exhausted, or until the sum of Five Thousand Dollars shall have been expended in said defense; provided said company shall not be under obligation to expend more than Ten Thousand Dollars in the aggregate in the defense of suits based on services rendered, by the holder hereof, during the original one year term or any renewed one year term of this contract.

Said company does not obligate itself to pay or to assume or to secure the payment of any judgment rendered against the holder hereof in any suit defended by it.

The company shall not compromise any suit or claim for malpractice against the holder hereof. Nor shall the holder hereof, after the company has entered upon the defense of any such suit in behalf of the contract holder, compromise the same without the coosent of the company in writing first thereto had, and by reimbursement of the company its expenses theretofore incurred.

No suit or claim will be defended by this company, under this contract, in which the cause of action arose previous to the date of this contract.

This contract does not cover criminal prosecutions nor suits for assault, crimioal abortion, foeticide, homicide or other criminal act, or actions arising by way of counter-claim or recoupment.

The company may cancel at any time the unexpired portion of this contract upon written notice mailed to the holder hereof, and the unearned portion of the consideration therefor, shall be returned to the holder hereof.

This contract does not take effect until the consideration therefor shall have actually been paid to the company or its authorized agent, but if the holder shall have paid such conideration and shall have received from the company or its duly authorized agent a memorandum certifying such payment and that the contract is to be subsequently delivered, then this contract shall be dated as of the date of such payment and shall be in force and effect from that date.

This contract shall not lapse at the end of the time as stated above if the holder hereof shall pay the annual consideration in advance at the Home Office in Fort Wayne, Ind., or to an authorized agent of the company, in exchange for the company's receipt, signed by the president and secretary and countersigned by the agent, but shall continue in force for the term or terms for which such annual consideration shall be paid; provided, however, that the liability of the company under such extension shall not be cumulative.

No consideration or agreement contained in this contract, or application for same, can be waived or altered in any manner by any person, other than the president or secretary, in writing endorsed hereon.

In Witness Whereof, The Physicians Defense Company has caused this contract to be signed by its president and secretary and its official seal attached hereto in Fort Wayne, Indiana, this _____ day of _____ 190__.

Miles F. Porter

President.

_____

Secretary.

Medico-Legal Bulletin.

LEGAL LIABILITY OF THE DOCTOR.

By C. M. Niezer, Counsel Physicians Defense Company.

(Read before the Elkhart Medical Association, Twenty-sixth Annnal Meeting, March 23, 1905, Goshen, Ind.)

Every malpractice suit is a serious affair for the reputable and conscientious physician. However groundless or insignificant the claim of the plaintiff may be in contemplation of law the physician is accused of a breach of that confidence which the community concedes only to him, and a violation of that duty which the law imposes upon him. His reputation has been attacked. The one thing of which he has fondly dreamt in the anticipation of his career. The thing he was taught to esteem more than all the other fruits of his labor; upon which depends, more than anything else, his professional success.

As to the standard of diligence, care and skill required of him, the law is favorable to the physician. He is not held to the use of skill which he has not had a reasonable opportunity to acquire, nor to the highest degree of skill nor even that higher than the standards of his brother practitioners. Therefore, I say, the law is favorable to the physician in the duty it imposes upon him. The difficulty arises out of a misconception on the part of the layman as to what the physician is supposed to do. That is, the layman, contrary to the established rule of law, is of the persuasion that the physician is capable and has the duty imposed upon him, to cure. It is certain that the number of malpractice suits is growing. From my own experience and opportunity to observe developments I would say that it is growing 50% per annum, and that the amounts of the verdicts rendered are absolutely without precedent. Two causes which contribute to this condition of affairs are, first; the growing tendency to sue for every personal injury whatever the circumstances or situation, second; the growing tendency on the part of the profession to perform experimental and exploritary operations or operations without the consent of the patient.

This tendency, while very commendable from the standpoint of science, as well as its ultimate benefits, not only to the individual patient, but to mankind in general, is not wholly sanctioned by the law. Because of this increasing tendency to bring malpracitce suits

the rules of law relative to the physicians' liability to his patient is of ever increasing importance. With the first cause which I have assigned for the growth of the number of suits, little can be done except to make the end as far off and tedious as possible. The second, however, is of different nature. At the present time most of the serious suits for malpractice allege facts constituting an exploritary operation, or as the law calls it, a technical assault. This question gives rise to more difficulty and is the basis of more suits than all other questions combined, therefore it shall be the main purpose of this paper to attempt to define the limitations placed upon the medical practitioner in this regard.

It is proper in order to gain an intelligent knowledge of this subject to recall a few of the fundamental rules of law governing the profession's liability for civil malpractice. Originally in England, as you well know, medicine was practiced in lieu of an honorarium. Under this system the physician could not enforce the collection of fees for services. Conversely, a physician could not be sued for damages because of alleged malpractice. This system was soon discovered to be very unjust and unsatisfactory and the fees of a physician were given the same standing in a court of justice as any other class of services. Likewise his liability for negligence was recognized. As to what constitutes actionable negligence relative to treatment administered by a physician and surgeon, has been the source of much controversy and the most generally accepted rule is the one defining the implied contract which arises out of the simple relation of physician and patient and is as follows: A physician or surgeon undertaking to treat a patient impliedly contracts that he possesses and will exercise in such treatment that degree and standard of ordinary and average skill, care and diligence which is exercised by physicians and surgeons in the same general line of practice in similar localities.

It is easily understood from this rule what a great part expert testimony plays in proving that certain acts were negligent.

And, further, when we bear in mind the well established rule of evidence, that in order to qualify as an expert witness to testify in a suit for civil malpractice the proposed expert must belong to and profess the same school of medicine as the one against whom he seeks to testify, we can easily understand how utterly impossible it would be to prove a physician or surgeon guilty of negligence if all the practitioners of his school would refuse to bear witness against him. It is often charged by the plaintiff's counsel, in these suits, that such is the case, but the number of suits filed against physicians and surgeons would appear to disprove this assertion.

It follows from the first rule that the physician is not an insurer or guarantor that the treatment he administers will effect a cure, unless he enters into an express contract with his patient to that effect.

Also, he is not liable for a mere mistake or error of judgment either in diagnosis or treatment.

Coming now to the main proposition of consent to an operation or treatment as an element in the liability of a physician or surgeon to his patient, we can state as a general psoposition of law; that the consent of a patient is necessary for the performance of an operation on his person by a physician or surgeon. Aside from the underlying principle necessary to support a contract, this rule is probably predicated upon the personal immunity of one to the absolute and uninterrupted enjoyment of his person as he will, not inconsistent with the rights of the state to the lives and energies of its citizens. Under our free government the free citizen's first and greatest right, which underlies all others, is the right to the inviolability of his person, in other words the right to himself is the subject of universal acquiescence and this right naturally forbids a physician or surgeon, however skillful or eminent, who has been asked to examine, diagnose, advise and prescribe, to violate without permission the bodily integrity of his patient by a major or capital operation, placing him under an anesthetic for that purpose, and operating upon him without his consent or knowledge.

As stated before, suits for civil malpractice predicated upon the infringement of this right are becoming very numerous. The greatest curiosity which has come to our hands alleging an unauthorized operation, is contained in a compliaint filed in the Supreme Court of New York. The burden of the charge is as follows·

> "That the defendant did not use due and proper care or skill in treating plaintiff for the said malady, and that he did on or about the 20th day of Aug., 1904, while the plaintiff was so under his care, perform an operation upon the plaintiff and amputated the thumb of his right hand, and also amputated the large toe of his right foot and attempted to graft said toe upon said hand."
>
> "That the amputation of his large toe of his right foot was wholly unnecessary and was done without the consent of the plaintiff, and without warrant or authority, and was done carelessly and negligently and was an experiment that defendant made without plaintiff's consent or authority."

This is simply quoted as a curiosity.

The main proposition is clear it is the multiplicity of facts and relations of the parties that cause the difficulty. The problem is, to determine what act or conduct will or will not constitute consent and when, if ever, is consent to be implied. Those interested in the legal liability of the medical profession have been anxiously awaiting the decision of some court of last resort upon this question. The first case involving this case directly, was decided in the Illinois App.

Court in the very recent case of Pratt vs. Davis. Unfortunately, however, the facts in the case compelled the court to a ruling adverse to the defendant so that the one precedent of a court of last resort is on the other side of the proposition. In this case the court said:

> "That the patient may by his whole course of conduct without the use of any express language giving consent, even place his body at the entire disposal of the surgeon or physician whom he consults. And for soldiers to go into battle with a knowledge beforehand that surgeons attached to the army to have charge of the wounded, might perhaps be considered an implied license for such operation as the surgeon afterwards in good faith performed. Perhaps, too, the various cases which might be supposed of sudden and critical emergency in which a surgeon would be held justified in a major or capital operation without the express consent of the patient, might be referred to the same principle of implied license. But the broad statement that when a patient places herself in the care of a surgeon for treatment without instructions or limitiations on his authority, she thereby in law consents that he may perform such operations as, in his best judgment, is proper and essential to her welfare, is not one to which this court can subscribe."

In the case of Sullivan vs. McGraw, 118 Mich. 39, this proposition is touched indirectly. The facts are as follows: The plaintiff went to a hospital under the direction of the defendant for the purpose of having his right leg operated on. When he was brought into the operating room, unconscious, and with his right leg prepared for the operation, the defendant said to his attendants that they had prepared the wrong leg. That they should have prepared the left leg and not the right for the operation. After making some inquiry from the brother and father of plaintiff, who appeared confused as to which leg was the correct one, he proceeded to operate on the left leg. The left leg was sound and after the recovery of the plaintiff the mistake was discovered. At the close of the evidence the court directed the jury to return a verdict for the defendant, as there was no ground for recovery because, notwithstanding, the mistake, the physician had used the proper standard of care and diligence in attempting to ascertain the proper leg to be operated upon. The plaintiff insisted that this was not the question but that the real question was whether or not the defendant had the consent of the plaintiff to operate on the left leg. In answer to this the court said:

> "Of course if there had been no consent at all to any operation it would have been clearly trespass to have touched the person of plaintiff, but plaintiff had gone to the hospital

for the purpose of having an opertaion performed upon him and to touch his person was not technically a trespass."

This case was repealed, reversed and sent back for new trial. In its opinion the Supreme Court said:

"Plaintiff had put himself under defendant's care for the purpose, as he says, of an operation upon the right leg, and according to the testimony of the plaintiff the defendant knew which leg was to be operated upon and these facts should have heen submitted to the jury."

I have no further report of this case at hand and do not know whether or not it ever came before the court the second time.

In Moscow a leading surgeon was imprisoned for performing an operation without the consent of the patient. This was also a case in which there was no consent to any operation.

In the Superior Court of Montreal a surgeon was employed to amputate the toe of the foot but proceeded to amputate the entire foot. The amputation of the foot occurred several days after the amputation of the toe and without the consent of the patient. The surgeon was held liable. This decision was placed on the ground that the amputation of the foot was an independent operation and since it was not shown in evidence to have been necessary the surgeon should have had the consent of the patient. Another phase of this question would arise in this way: Suppose a surgeon after performing the operation consented to, discovered that it was necessary to perform an additional operation in order to render the original operation effective or to save the life of the patient. Some light is thrown upon this by the decision in the case of Ware vs. Graduate Hospital et. al., before a Cook County, Illinois court. In this case the physician was engaged to operate for a ventral hernia and he discovered in the course of the operation an extensive tubercular condition of the ovaries not disclosed by the diagnosis. He then proceeded to remove the ovaries without restoring patient and asking her consent. The evidence developed that the removal of the ovaries was necessary to save the patient's life and to render the original operation of any advantage. The case was dismissed at the close of the plaintiff's evidence on the ground that the surgeon's action in removing the ovaries was justified. This case would appear to support the theory that the consent of a patient may be inferred from the exigencies of the case.

To me this appears to be the reasonable and sensible rule. Holding both justice to the practitoner and the highest obtainable security and benefit to the patient. Since a physician is held to an exercise of reasonable skill and diligence in his practice why should he not be allowed to invoke the same standard in directing his efforts, and especially at times when the exercise of such standards would be of the greatest benefit to his patient. Imagine the disappointment, chagrin

or even hatred in the heart of a patient who, when returning to consciousness after undergoing an abdominal operation would be told by the man in whose hands he had placed his life that he was only awakened to give his consent to an additional operation without which his past trial would be of no consequence and which would involve the same agony and hazzard as the first. I am stating this, however, not as the law for no court of last resort, at least to my knowledge, has decided this point, but only as I think the law in justness and fairness should be.

The question of implied consent is therefore of greatest importance. The extreme case we have at hand is from England. In Beatty vs. Collingsworth, Q. B. D. (44 Cent. L. J. 153) an unmarried woman who was about to submit to the operation of ovarotomy told the defendant, who was said to be one of the most eminent London surgeons, that if both ovaries were found to be diseased he was to remove neither. He replied, "You must leave that to me." The plaintiff denied hearing this last remark. Both ovaries were found diseased and removed. The plaintiff was engaged to be married but upon learning that both ovaries were removed broke the engagement and brought suit against the surgeon for malpractice. The court charged the jury in effect that, the plaintiff had tacitly consented to the operation and a verdict was rendered for the defendant. This case may be justly criticised, upon the ground that the facts involving a direct prohibition would seem to exclude the possibility of implying consent. It is one thing for a surgeon to refuse to operate unless unlimited discretion is confided to him and quite another thing to absolutely disobey express instructions. Undoubtedly the defendant's wisest course would have been to refuse to operate unless the scope of his authority was agreed upon in advance. This case can hardly be considered the law in America for, I do not believe, that a court here would instruct a jury under like circumstances that there was a tacit consent to the operation, but would leave it for the jury to determine whether the evidence before them showed a tacit consent.

Owing to the fact that husbands and parents have a cause of action for injuries to wives and children the question of consent sometimes becomes important in case of operation upon such persons. There are two cases in this country which cover this point.

In the case of McClallen vs. Adams, 19 Pick (Mass.) 333 a husband placed his wife under the care of a physician, at some distance from his own residence, for treatment for a tumor of the breast. During the treatment a cancerous condition developed and the physician, without the knowledge of the husband, amputated the wife's breast. The patient never recovered. The court held that the husband in placing the wife in the care of the physician under the circumstances, impliedly requested him to do all such acts and adopt such treatment

as in his judgment would be most likely to effect her ultimate cure and recovery, with the assent of the wife, and therefore the operation in question was within the scope of the authority given him.

In the case of State ex rel Janey vs. Housekeeper et al, 70 Md. 162, the evidence showed that the wife had been afflicted with a supposed tumor in her right breast which was afterwards ascertained to be a cancer. The entire breast was removed in the operation. The husband testified that he would never have consented to the operation. The court said:

> "The consent of the wife, not the husband, was necessary. The professional man whom she called in and consulted was the proper person to determine what ought to be done. He could not compel her, of course, to submit to an operation but if she voluntarily submitted to its performance her consent will be presumed, unless the was the victim of false and fraudulent misrepresentations. "Surely," the court continued, "the law does not authorize she husband to say to the wife, 'you shall die of the cancer, you cannot be cured, and a surgical operation affording only temporary relief will result in useless expenditure.' The husband has no right to withhold from his wife the medical assistance which her case might require."

The evidence did not show whether the wife was informed of the character of the operation to be performed but the court said the law relative to this question is as follows:

> "The party who allows a surgical operation to be performed is presumed to have employed the surgeon for that particular purpose."

To summarize the principles we have discussed:

The consent of a patient to an operation is necessary.

This consent may be express or implied.

It cannot be implied from the mere relation of physician and patient.

It is implied or presumed from the voluntary submission by the patient to the operation.

It may be implied from the exigencies of the case as judged by the rule of reasonable care and skill when necesasry to accomplish the purposes of the operation consented to or to save the life of the patient.

The husband's consent is not necessary to perform an operation upon the wife.

A parent's or guardian's consent is not necessary to perform an operation upon a child if the child is capable of judging in the matter.

SHOULD THE PLEA OF INSANITY SHIELD THE CULPRIT IN THE COMMISSION OF CRIME.

By Dr. J. L. Hill.

(Read before the Central Willamette Valley Medical Association, Albany, Oregon, January 5, 1905.)

This should be made one of the most serious questions that could confront the civilized nations of the world. It is not only a medico-legal, but a moral question as well.

Insanity as an excuse has been the source of the most flagrant abuses by the accused, the attorney for the defense, and the medical expert. Thefts, incendiaries, murders, and all manner of crimes, are often excused, and the culprit discharged on the plea of insanity.

To say just where sanity ends and insanity begins is not always easy. To say that any one who commits a deliberate and premeditated crime is sane may be a stretch of the imagination, for crime and sanity seem so much at variance it leaves room for doubt whether they can be harmonized at all.

If these premises be true, should any one who commits a felony be punished, or should not all law-breakers be excused on the theory of insanity?

If there was no severe punishment for grave offenses they would be mulitplied till there would be no respect for life or property. If we admit that all criminals are unbalanced, otherwise they would not contemplate the commission of crime, we must also admit that those who are restrained from the commission of crime through fear of the law are insane, but are governed alone by fear.

If we pursue this to its ultimate and logical end we might truthfully admit that perfect sanity does not dwell in any individual.

What is an extremist, a radical, or inordinately passionate man but unbalanced? Is this not the first step toward insanity? We pronounce such an one an unreasonable crank and hold him accountable before the law for his peccadilloes. If his wrongs are magnified into great crimes we then see in his extreme ways insanity and acquit him on that ground.

For an expert to assert that a certain individual is or is not insane is something he cannot truthfully do.

It is generally conceded that one who commits suicide is insane though prior to the time of the commission there had been no indication that a tragedy was contemplated, or that the mind was aberrant. Many who have attempted suicide but have been rescued express regret and shame at having made the effort, and never attempt it again. Are they insane? It is my opinion that many suiciders are not insane but they become tired of the whirlpool of life and are too cowardly to bravely and honorably continue the scuffle in the turmoil. But

suppose the generally accepted opinion of the unsoundness of mind of all such persons is to become an established ruling, and especially where everything goes to show that self-destruction was planned and matured a considerable time before its consummation, it is not an imposition on sanity to favorably recognize any business transaction of that individual which might have taken place between the time of the planning for self-destruction and its commission? Or would it not be a safer thing to hold all persons who have been legally charged with insanity, prior to the commission of the deed, and pronounced unsafe to be at large, responsible for the crimes committed, without reference to the mental state—looking alone to the magnitude of the offense to determine the punishment, and not at the individual's mental condition?

Under the latter view there could be no obstructing the channels of justice by expert medical testimony, which is so uncertain in fact and bewildering in phraseology to the ordinary juryman. It would also curtail the number of acquittals for crime through the machinations of the legal profession.

If the accused had not been insane enough to be under the vigilance of the law he certainly should not be considered too insane to be amenable to the law he has transgressed.

Guiteau was a crazy man. He showed it in the trial, and on the gallows he showed it by singing a silly, pointless song of his own composing. Yet he was very justly hanged.

Pendergast, in committing a foul murder in broad daylight, when a hope af evading detection and arrest, followed by conviction and execution could not have been entertained, showed very plainly a weakness of mind; yet the law refused to acquit him on the plea of insanity. He was executed for the murder, as he should have been, notwithstanding he was crazy.

When President McKinley was addressing thousands of people, Colgolz soon became the most notorious person in the many thousands. From an obscure social rake his name was suddenly in the mouths of all people of the civilized world. Who will say he was sane? He was a crazy madman, and if he had killed some one of less celebrity than a president of a great nation it is quite possible he would have been sent to an insane asylum instead of the death chair.

Besser assassinated the King of Italy, in public, and went to solitary confinement in a dungeon for it, where death by suicide ended his torment a year or two afterwards. He could not have had a ray of hope, before committing the crime, that he could escape the most horrid punishment—even worse than burning at the stake—that a human being could suffer. Could he have been sane? No, he was crazy. His insanity did not, and should not have saved his worthless life to menace others.

There was method in the planning of all the murders here mentioned, yet they were planned and executed by insane men. There is often astuteness in the acts of persons who are locked up in asylums.

Those mentioned were not permitted to escape the executioner on the plea of insanity, because the objects of their murderous revenge were the heads of nations, or of rich municipalities. But the same verdict does not always obtain where the victim of the assault is less distinguished.

The point I would make is that no one should, under any circumstances, be legally shielded from punishment for crime on a plea of insanity unless he had previously been adjudged insane. I might go further and say that though insanity had been established, and confinement in an asylum had been resorted to, if the authorities having supervision over the insane had pronounced the person sufficiently sane to be discharged, the public should not be menaced by him, and he be excused for the offense because he had at one time been insane.

The only safe way to handle such cases would be to consider all persons who are not under confinement, in consequence of dethroned reason, to be amenable to law, even though their minds may not be the soundest.

If we act on the hypothesis that all insane persons are in confinement, and all who are at large are sane, mistakes will less often be made. Injustice would sometimes be done, but under what law is the innocent not sometimes made to suffer through misapprehension? Under the present misapplication of leniency the suffering of public weal is ten-fold greater than individual punishment could be.

It might be asked, what would be done with the idiot, or fool, who, while in a half-witted frenzy, shot some one to death? Or when not in a frenzy, but in his ordinary state took life as a matter of simple curiosity, or did it without thought on the subject in any way? He should be sent to the gallows, would be my answer.

If the parents, or guardians of the idiot refuse to send him to a proper house of restraint, and the public neglects to do it, his mental infirmities should not shield him. Some might say the parents, or the public—one or both—should be made to suffer, and not the idiot who knows not right from wrong. The reply is that the idiot was unfortunate in being in bad company of his thoughtless parents and a negligent public, and like old dog tray, must suffer for their sins.

Euthanasy for all hopelessly insane and idiots would be an act of mercy to the afflicted and a boon of safety to the public.

This latter proposition is not embraced in the question at issue. If it were, I might dilate affirmatively on it.

The same legal rule should apply in all business transactions. I do not believe a will, or other document, should be nullified on the

grounds of insanity where no attempt had been made to establish mental disqualification previously.

Law suits are prolonged, bequests set aside, deeds annulled, and the intent of the one who accumulated the wealth disregarded on the pretext of insanity, when, in the majority of instances, the mental acumen of the one whose mind is assailed is far better than those who become the beneficiaries after his death. For proof we look in any direction and see the pauper heirs of wealthy parents who have squandered their heritage.

This being true of heirs who have come into peaceable possession of their stipend, how much more true it is where possession is obtained through accusation of insanity?

Law is mockery and a dispenser of injustice, in the majority of instances, where it makes insanity a plea in any case, and I believe the statutes of every state should be radically changed and made to conform to the opinions herein advanced.—Medical Sentinel.

DAMAGES ALLOWED FOR WRONGFUL TAKING OF STOMACH FROM DEAD BODY.

The Supreme Court of Wisconsin says that the case of Koerber vs. Patek presented a field for consideration unchartered by any direct decisions in that court. It was alleged in the complaint that the plaintiff was the son and heir of his mother, who died in a hospital, and was by her, before her death, instructed and requested to take charge of her body for purpose of burial, and was the only person interested; that he did so, removing the body to his residence, and proceeding to have the same prepared for burial; that the defendant requested permission to merely examine the stomach of said body, which request being granted, he willfully, etc., without authority, etc., cut out and carried away the stomach, and refused to return the same on request, whereby burial became necessary without it; that thereby the rights of the plaintiff had been recklessly and wilfully trespassed on, and his feelings greatly injured, so that he had suffered both in mind and in body, to his damage $5,000. The conclusion of the Supreme Court, reached after discussion, protracted, it says, perhaps unduly in deference to the novelty of the question in Wisconsin, and to the earnestness of counsels' argument, is that the complaint stated a good cause of action in favor of the plaintiff, and that the trial court erred in sustaining a demurrer to it.

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INSURANCE ILLEGAL.

The decision of Attornev General Mullan, of Iowa, which follows sustains the long standing contention of the Physicians Defense Company that indemnity against a physician's liability for damages is not within the scope of public policy nor the proper subject of insurance. We have always contended that the legitimate scope of a company entering this field of this class of litigation is to maintain a defense but not to assume the payment of any judgment for damages. Developments show that since the indemnity companies have been in the field the judgments against physicians have been more frequent and unprecedented in amount. Verndict after verdict has been returned against physicians simply because an indemnity company was back of them. This danger is not present under the contract issued by the Physicians Defense Company as its efforts extend only to a thorough defense of the action.

Attorney General Mullan has also made it clear that this class of indemnity is not a legitimate field for insurance as it is not predicated upon an accident. Everybody knows, who knows anything about malpractice, that it cannot be an accident. If it is an accident the physician is not liable, if it is negligence he should be liable. Indemnity against a physician's liability for negligence can only result in the undertaking of difficult and hazardous operations upon which the life and death of the patients depend and by those unskillful, charlatans

and quacks who pretend to covet a reputation for surgical skill. No thorough going and legitimate physician and surgeon will seek an indemnity against his negligence. What he does he can sustain by his professional brothers and those who cannot sustain their practice by the testimony of their brothers should not be allowed under the public policy of the land to inflict their practices on patients.

The decision of Attorney General Mullan does not in any way effect the contract issued by this company.

ATTY-GEN. MULLAN IS AGAINST INSURANCE FOR ERRORS.

INABILITY NOT AN ACCIDENT.

DETRIMENTAL TO PUBLIC POLICY TO PERMIT AGREEMENT.

Lack of Skill and Error in Treating Patients Not Considered Liability for Company to Guard.

Attorney-General Mullan yesterday transmitted an opinion to the auditor of state that physicians' liability insurance is not authorized by the statutes of Iowa and no insurance company had the right to issue policies of that character in this state.

The question was submitted on the proposeal of the Travelers' Insurance Company of Hartford, to write such a policy. The policy was studied carefully by the attorney-general, who decided yesterday that section 1709 does not warrant its issuance in Iowa.

The company sought to issue the policy under the fifth subdivision under section 1709, which authorizes insurance companies to insure "the health of persons and against personal injuries, disablement or death resulting from traveling or general accidents by land or water and insure employers against loss in consequence of accidents or causalties of any kind to employes or other persons or to property resulting from any act of an employe, or any accident or casualty to persons or to property, or death occurring in or connected with the transaction of their business, or from the operation of any machinery connected therewith."

MULLAN'S DETAILED OPINION.

Concerning the physicians' liability policies, General Mullan says:

Such insurance is clearly not an insurance of the health of persons.

It is insurance against personal injuries, disablement or death resulting from traveling or general accidents by land or water? The policy proposed to be issued by the Travelers' Insurance Company by its terms insures the physician or surgeon theirein named against loss from common law or statuatory liability for damages on account

of bodily injuries, fatal or non-fatal, suffered by any person by reason of any error or mistake made by the assured in the practice of his profession.

It has been forcibly urged on the part of the insurance company that indemnity against loss from common law or statuatory liability for damages on account of bodily injuries suffered by any person by reason of an error or mistake made by the assured, is valid, and that insurance against one's own negligence is not void as against public policy. It is also urged that the insurance created by the policy referred to is insurance against personal injuries, or what is commonly known as accident insurance, and therefore authorized by the provisions of subdivision 5 of section 1709 of the code.

The cases cited by counsel for insurance company, upon the proposition that insurance against common law or statuatory liability for damages on account of bodily injury suffered by any person, by reason of an error or mistake made by the assured, is valid, are all cases of insurance of property against loss or damage by fire; and nearly all of them relate to the question of the adjustment of the liabilities of insurance companies where there was a re-insurance or a doubleinsurance of the property damaged or destroyed. None of them bears upon the question under consideration.

The cases cited in support of the proposition that the physicians' liability policy proposed to be issued is a species of accident insurance, are not authority for the position taken by counsel. In all of the cases the person who was injured was insured as against personal injury by an accident, and the question which arose in such case was whether the injury which had been received by the insured was caused by an accident. The Travelers Insurance Company, by the policy under consideration, does not undertake to insure the person therein named against personal injuries, disablement or death resulting from traveling or general accidents by land or water, but against any legal liability which he may incur by reason of his want of proper skill or knowledge in his profession, or by reason of any negligence or carelessness upon the part of the insured in the treatment of a patient.

There is a very wide distinction between the kind of insurance sought to be effected under the policy named, and that which is permitted under subdivision 5 of section 1709 of the code. That subdivision permits insurance of the health of persons and against personal injuries, disablement or death resulting from traveling or general accidents by land or water.

It is "accident" that the legislature has authorized insurance companies to insure against. The liability of a physician or surgeon, either at common law or under the statute, for damages caused by his lack of skill, or a mistake made by him in the treatment of a patient,

is not an accident within the meaning of the statute, or as defined by the courts.

Malpractice is the "bad professional treatment of disease, pregnancy or bodily injury, from reprehensible ignorance or carelessness or with criminal intent."

A physician is not an insurer. All that he is required to do is to bring to his assistance the ordinary knowledge, learning and skill which physicians possess in the vicinity in which he practices his profession. A physician possessing the requisite qualifications and applying his skill and judgment with ordinary care and diligence to the diagnosis and treatment of a patient, is not liable for an honest mistake or error of judgment. Ewing vs. Goode, 78 Fed. Rep., 442.

The policy under consideration attempts to indemnify a physician or surgeon for the failure to bring to his assistance in the treatment of a patient, or in the performance of an operation, the ordinary skill, learning and ability possessed by physicians in the community where he practices his profession, and for the failure of such physician or surgeon to use ordinary care and diligence in the diagnosis and treatment of a patient, or in the performance of an operation which he is called upon to perform.

As suggested, such insurance cannot under any interpretation of the meaning of the word "accident" be classed as insurance against personal injuries, disablement or death, resulting from traveling or general accidents by land or water.

The conclusion must therefore be reached that such insurance is not authorized by the statutes of Iowa, and that no insurance company has the right to issue policies of the character of that under consideration in this state.

INSANITY OF RELATIVES OF MAKER OF WILL.

The First Appellate Division of the Supreme Court of New York says, in the will contest case of Pringle vs. Burroughs, that it is of opinion that, before insanity can be shown to have existed in the membership of a testator's family it must have appeared that to some extent, at least, the testator had suffered from a like affliction. Then, undoubtedly, evidence of the existence of insanity, especially if of a hereditary character, in the ancestors or other relatives of the testator, would be pertinent and competent. Mere feebleness of health produced by disease, however, is not a sufficient basis on which to found the right of inquiry into the mental condition of other relatives.

Judicial Decisions.

Under this heading will be presented each month information relative to judicial decisions affecting the medical profession.

LIABILITY FOR OPERATING WITHOUT PREVIOUS CONSENT.

The Appellate Court of Illinois, First District, says, in Pratt vs. Davis, an action brought by the latter party, that it thinks that both courts, the lower one and it, recognize adequately the great obligations to medicine and to surgical skill under which all civilized communities lie, and would be far from upholding any ungrateful attempt to make liable "for a failure to cure" one who "free from any imputation of malice, wantonness, recklessness, lack of skill, or negligence," had used "whatever of skill or learning and of material equipment were at his disposal," for the relief of the complaining party. Had this case, in the opinion of the court below, been such an attempt, there would have been no judgment for the plaintiff; if it were so in the opinion of this court, the judgment would be annulled. But great as are the obligations to which this court has alluded, they do not confer on the physician or surgeon unlimited power to use his own discretion in the surgical or medical treatment of patients who, suffering from some bodily ailment, come to him for advice and assistance. Undoubtedly an implied license "to have," as the defendant's argument phrased it, "the proper remedial means brought to bear" often exists. The patient may, by his whole course of conduct, without the use of any express language giving consent, evidently place his body at the entire disposal of the surgeon or physician whom he consults. And for a soldier to go into battle with a knowledge beforehand that surgeons attached to the army are to have charge of the wounded, might perhaps be considered an implied license for such operations as the surgeons afterwards, in good faith, performed. Perhaps, too, the various cases which might be supposed of sudden and critical emergency, in which the surgeon would be held justified in a major or capital operation without express consent of the patient, might be referred to the same principle of an implied license. But the broad statement put forth by the defendant as a correct proposition of law, that "when a patient places herself in the care of a surgeon for treatment without instructions or limitations"—it is to be presumed that this means express limitations—"on his authority, she thereby in law consents that he

may perform such operation as, in his best judgment is proper and essential to her welfare," is not one to which this court can give consent. It does not hold, again to quote defendant's counsel, that there is "a universal acquiescence of lay and professional minds in the principle that the employment of a physician or surgeon gives him implied license to do whatever, in the exercise of his judgment, may be necessary." On the contrary under a free government at least, the free citizen's first and greatest right, which underlies all others—the right to the inviolability of his person, in other words, the right to himself—is the subject of universal acquiescence, and this right necessarily forbids a surgeon or physician, however skillful or eminent, who has been asked to examine, diagnose, advise and prescribe (which were at least necessary first steps in treatment and care), to violate, without permission, the bodily integrity of his patient by a major or capital operation, placing him under an anesthetic for that purpose, and operating on him without his consent or knowledge. Counsel asserted that not a case can be found in the English or American reports where a surgeon has been held liable for performing an operation without the consent of the patient. This is, perhaps, true. This court has not been able, in its examination, to find such a one, but it by no means follows that the liability does not exist. It would rather indicate that, obedient to the law and the code of professional ethics as well, surgeons have abstained from actions from which the liability would accrue, or at least had not carried the contention that it does not exist in the courts of last resort. It is this court's opinion, except in cases where the consent of the patient is expressed or is implied by circumstances and occasions other than a mere general retainer for medical examination and treatment, and except also where there is a superior authority which can legally and rightfully dispose of the person of the patient, and which gives consent, a surgeon has no right to violate the person of the patient by a serious major operation, or one removing an important part of the body. Illustrations of such superior authority as the court alludes to can be found in the control which the court takes of persons under sentence for crime, the power which is vested in parents over minor children of tender age, and the authority given to legally constituted guardians of the person of those who are insane or imbecile. In a more restricted form it may be said to exist in the marriage relation, which makes the husband the head of the family. This last authority is not, however, supreme in the matter of surgical operations on the persons, and this is really the gist of the decisions in McClellan vs. Adams, 19 Pickering, 333, and State vs. Housekeeper, 70 Maryland, 162, which were urged in argument as showing that the consent of the husband of the plaintiff was not necessary in the case at bar. These decisions are not authority for the proposition that when a wife is hesrelf incompetent from mental condition

intelligently to give or withhold her consent, that the husband's consent is unnecessary, but for the very different proposition that where the wife, competent mentally to decide, assents and desires a dangerous operation, the surgeon is justified in performing it (if it be in his judgment a proper one) without the further consent of the husband. In this case, the plaintiff, who was about forty years old, had been afflicted with epilepsy for many years, ever since she was a young woman. The defendant seemingly considered the fact that she had epilepsy and wanted to recover from it as proving an implied acquiescence in anything he might choose to execute in the way of surgery, and as a sufficient justification for assuming her consent to a major operation, of the necessity or likelihood of which he did not inform her. She went to a hospital under his management, and the next day he performed the operation on her which he spoke of "as appearing on the surface" as necessary—the principle object apparently being to treat a lacreation of the womb. She returned to the hospital again, when a hysterectomy was performed, consisting in the removal of the ovaries and uterus from her body. That the consent of the patient herself to such an operation as was performed in this case was necessary if she be in a free condition and in such mental health as implied capacity to decide, the court says that it does not believe has been denied by any court. And, in view of the testimony, both of the plaintiff and the defendant, the court says that the existence of any consent, express or implied, on the part of the plaintiff personally must be eliminated from consideration. Furthermore, the court is of the opinion that the preponderance of the evidence with regard to the husband's consent, was that it was not giveu for the performance of this major operation. Its conclusion is, therefore, that whether the evidence were to be considered as showing the plaintiff sane or insane at the time of the operation, she would in each case be entitled to recover damages. Without intending to lay down herein a rule to be quoted in subsequent cases, where, perhaps, it might seem as dangerous to recognize in a husband an unlimited right to expose, withiout her consent, the body of an insane wife to the surgeon's knife, as it evidently is in the eyes of the legislature of Illinois to allow a husband the right to restrain such a wife of her liberty without a judicial inquiry into her insanity, the court says that it might assume, for the purposes of the present case, that as the husband is the head of the family and naturally the protector and guardian of an insane wife's interests, consent by him, implied or expressed, would justify the defendant and avoid the liability charged aganist him in this action. But it was obvious that to make good this defense, after it had been admitted or had otherwise appeared that no consent of the patient herself could be shown, the defendant must show two things affirmatively: first, that the patient was not mentally in a condition to be in control of her own body; and, secondly, that her

husband consented to the operation. On the defendant, as to these matters, lay the burden of proof. The question as to damages resolved itself into this: What damage should be assessed against the defendant for the unauthorized act in removing the uterus of the plaintiff? The law infers damages when any trespass on the person of another is committed. It infers bodily pain and suffering from such an act, and allows damages for them, however difficult they may be of ascertainment or apportionment. Moreover, the court thinks that this was a proper case for the assessment of exemplary damages, and that the amount given, $3,000, was a moderate and judicious one under all the circumstances shown. It would not do to say that neither malice, violence nor recklessness was shown on the part of the defendant, because there was no claim that he was actuated by dislike, hatred or desire to ultimately injure the patient in what he did. He probably thought that the operation would do not ultimate harm and might do good. If the act was an unauthorized trespass on the body of the plaintiff—if it was an act, in other words, in the mutiliation of her body, which he knew, or was bound in the eye of the law to know, he had no legal right to do—the absence of such a morally evil intention as before indicated did not relieve it from the imputation of malice in its legal sense. It was willful, and the deliberate intention to commit an act which the defendant was bound in the eye of the law to know was illegal, was there. That made malice in a legal sense. It was violent, oppressive wanton and reckless in the same sense.—J. A. M. A.

LIABILITY OF DENTIST ADVISING AGAINST SEEING PHYSICIAN

The Supreme Court of California says, in Mernin vs. Cory, an action for malpractice against a dentist, that the jury were instructed as follows: "If you find from the evidence that defendant advised plaintiff not to consult a surgeon or secure medical treatment after her jaw was injured by defendant, if you find the same was carelessly and negligently injured by defendant, and that plaintiff relied thereon, and did not consult a physician or surgeon for a number of weeks after such injury, and that by reason of such delay plaintiff's injuries were aggravated and made worse, and that it was more difficult or impossible to treat or cure such injuries of plaintiff, and that thereby such injuries became and are permanent and can not be cured, and the same has affected the general health of plaintiff, and she has become and is sick and disordered and unable to work or perform labor, or support herself by her own labor and work as she did prior to such injuries, if you find that she did so work and support herself before she was injured by defendant—then I instruct you that you may take all such matters into consideration in fixing the damage incurred by plaintiff by such acts." It was contended that this instruction was

erroneous, because it was not the duty of the defendant, being merely a dentist and not a general physician or surgeon, to give the kind of advice asked by the plaintiff. But the Supreme Court does not think that this contention was maintainable. It says that while a dentist may be qualified for his profession without being learned in the general science of therapeutics he certainly should have such knowledge of the very bone out of which he extracts a tooth as to understand whether it had been so injured as to require treatment beyond his skill. As to the contention that the instruction was erroneous because it did not expressly state that the advice was carelessly or unskillfully given the court says that other instructions that were given clearly informed the jury that carelessness or unskillfullness must have attended all the alleged acts of the defendant in order to make him liable, and there was no necessity of repeating them at every part of the instructions. Moreover, if the facts stated showed malpractice, the use of adjectives or adverbs to expressly characterize such malpractice as careless or unskillful would add nothing to the statement. After the alleged acts of malpractice the plaintiff had a "popping" or "clicking" of the jaw—a disagreeable sound made by a movement of the jaw. The defendant offered to call several witnesses to testify that each of them had a clicking jaw. The court does not think that it was error to sustain an objection to the proposed testimony.

LIABILITY FOR MALPRACTICE. X-RAY EVIDENCE.

The Supreme Court of Arkansas says that, in the malpractice case of Miller vs. Minturn, brought by the latter party, the injury was diagnosed as "a compounnd dislocation of the tibia at the ankle join complicated with a potts fracture." The evidence on the part of the plaintiff fully sustained the charge of malpractice. That on part of the defendant approved his treatment, and exonerated him from negligence and unskillfulness. The jury settled the conflict in favor of the plaintiff. It was then insisted that the verdict for $1,500 was excessive. Mrs. Minturn suffered great pain for many months. At the time of the trail she was still unable to bear any weight on the injured limb, and the indications were strong that it would be years, if ever, before she regained use of her ankle. It was suppurating for many months after the physician treated it, and it was apparent that the bones were not properly brought together. The jury was convinced, from legally sufficient evidence, that this unfortunate condition was directly due to the unskillful and negligent treatment of the physician. The verdict was not excessive. Nor does the court consider that the physician could claim the exemption allowed by the constitution of Arkansas against execution on a judgment "on debt by contract," the action, in substance, being for the wrongful act (tort) of

the physician. It says that the action could have been brought for breach of contract or for the tort (wrongful act)—in the former case relying wholly on the contract, express or impiled, to treat skillfully and carefully, and waiving the tort, or, in the latter, the contract could be ignored, or pleaded as an inducement, and the action sound in tort alone. Again, the court says that the objection was made to the introduction of *x*-ray photographs of the injured ankle, on account of the alleged inherent weakenss of such evidence, and lack of expert knowledge of those making them. The photographs were taken by a professor of the university, with an apparatus belonging to the university, and one of the best made. One of the plates was developed by the professor, and the other by an experienced photographer. The professor's knowledge of radiography was acquired from reading and experimentation. He was frank in admitting this was a subject not thoroughly understood by him, nor any one else. Counsel quoted medical authority to the effect that "radiography, though useful, is at times dangerous, by misleading; by no means to be assumed infallible by a jury or a court." Giving full sweep to this caution in regard to this new science, it did not prove the photographs inadmissible, but merely that they were not infallible and might be misleading. The frankness of the witness was a sufficient guard against their being treated as infallible, and there was nothing to indicate wherein they were misleading. There was no error in admitting them in evidence. —*J. A. M. A.*

ADMISSIBILITY AND USE OF SKIAGRAPHS.

The Supreme Court of Illinois says, in Chicago and Joliet Electric Railroad Company vs. Spence, a personal injury case brought by the latter party, that, as the case might be again heard, it was necessary it should consider the insistence that the trial court erred in permitting the introduction in evidence of a skiagraph, or *x*-ray photograph, of a portion of the chest and body of the party suing. The skiagraph was made by an expert, who testified he was an *x*-ray expert, and was regularly engaged in taking such photographs for physicians; that he took the negative from which the photograph was developed, and that he developed the photograph; and that it was an accurate and correct representation, etc. It was intended to show by the skiagraph that the party's heart had been displaced, that the walls of that organ had become thick, and that an abnormally heavy tissue had formed on the walls of his heart. The testimony of the *x*-ray expert who had taken the skiagraph tended to show the picture correctly represented the condition of the heart of the party. Photographs taken by the *x*-ray process are admissible in evidence after proper preliminary proof of their correctness and accuracy has been produced. And the Supreme Court thinks the tesitmony of the *x*-ray expert who

made the skiagraph was sufficient to justify the court in ruling that the picture should be admitted in proof. Subsequently, when the company was introducing testimony in chief, another *x*-ray expert was produced in its behalf. This witness gave testimony tending to show that the skiagraph had not been properly taken, and expressed the opinion that the picture was of little or no value as a representation of the heart and other portions of the body of the party suing. But the court was not asked to exclude the picture because of this adverse criticism; nor does the Supreme Court think the motiion to exclude should have been granted, had it been interposed. It further says that it was not error to allow the jury to take the skiagraph with them when they retired to consider their veridct. Paragraph 56 of the practice act authorizes "papers read in evidence, other than depositions," to "be carried from the bar by the jury." "Papers in evidence" clearly embrace photographs or skiagraphs offered and received in evidence. One of the definitions of the word "read" given by Mr. Webster is "to discover or understand by characters, marks, features, etc.; to gather the meaning of by inspection; to learn by observation." Photographs or skiagraphs produced in evidence on a trial before a jury are, within this definition, "read" in evidence, and may be taken by the jury on their treatment to consider and determine the cause. 12 Ency. of Pl. and Pr. 591, 592; Barber vs. Perry, 67 Iowa, 14.

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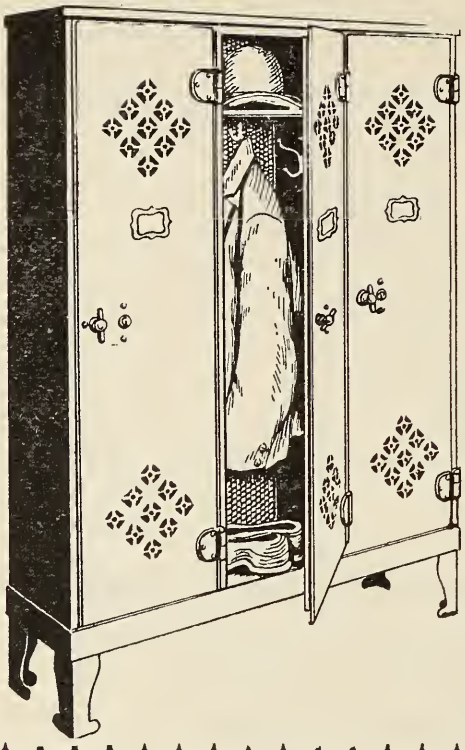

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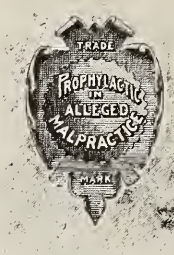

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Immediate notice by telegram, must be given the company at the Home Office at Fort Wayne, Ind., of any suit brought or demand made; and the holder hereof shall immediately forward the summons, or other process served, and the complaint or petition filed; together with a full and complete history of the case and services rendered.

Upon receipt of notice from the holder hereof that a suit has been commenced against him for damages for civil malpractice, the company will employ a local attorney in whose selection the holder hereof shall have a voice, who, together with the company's attorney, will defend the case without expense to the holder hereof.

Such defense will be maintained until final judgment shall have been obtained in favor of the holder hereof, or until all remedies by appeal, writ of error or other legal proceedings shall have been exhausted, or until the sum of Five Thousand Dollars shall have been expended in said defense; provided said company shall not be under obligation to expend more than Ten Thousand Dollars in the aggregate in the defense of suits based on services rendered, by the holder hereof, during the original one year term or any renewed one year term of this contract.

Said company does not obligate itself to pay or to assume or to secure the payment of any judgment rendered against the holder hereof, in any suit defended by it.

The company shall not compromise any suit or claim for malpractice against the holder hereof. Nor shall the holder hereof, after the company has entered upon the defense of any such suit in behalf of the contract holder, compromise the same without the consent of the company in writing first thereto had, and by reimbursement of the company its expenses theretofore incurred.

No suit or claim will be defended by this company, under this contract, in which the cause of action arose previous to the date of this contract.

This contract does not cover criminal prosecutions nor suits for assault, criminal abortion, foeticide, homicide or other criminal act, or actions arising by way of counter-claim or recoupment.

The company may cancel at any time the unexpired portion of this contract upon written notice mailed to the holder hereof, and the unearned portion of the consideration therefor shall be returned to the holder hereof.

This contract does not take effect until the consideration therefor shall have actually been paid to the company or its authorized agent; but if the holder shall have paid such consideration and shall have received from the company or its duly authorized agent a memorandum certifying such payment and that the contract is to be subsequently delivered, then this contract shall be dated as of the date of such payment and shall be in force and effect from that date.

This contract shall not lapse at the end of the time as stated above if the holder hereof shall pay the annual consideration in advance at the Home Office in Fort Wayne, Ind., or to an authorized agent of the company, in exchange for the company's receipt, signed by the president and secretary and countersigned by the agent, but shall continue in force for the term or terms for which such annual consideration shall be paid; provided, however, that the liability of the company under such extension shall not be cumulative.

No consideration or agreement contained in this contract, or application for same, can be waived or altered in any manner by any person, other than the president or secretary, in writing endorsed hereon.

In Witness Whereof, The Physicians Defense Company has caused this contract to be signed by its president and secretary and its official seal attached hereto in Fort Wayne, Indiana, this ____ day of ____ 190__.

FORM I

Miles G. Porter
President.

C. H. Merritt
Secretary.

Medico-Legal Bulletin.

THE PRESENT STATUS OF THE LAW RELATING TO THE VACCINATION OF SCHOOL CHILDREN.

By Hon. Sanford T. Church,
Deputy Attorney-General, State of New York.

The title of my subject and the fact that I am a lawyer will render it almost unnecessary for me to state that I shall treat the subject, in talking to a learned body of medical practitioners, strictly from a legal standpoint. I realize, however, the difficulty which confronts the medical man in reference to vaccination, and particularly vaccination of school children. It is a simple proposition for a physician to treat a sick person, compared with undertaking to prescribe for a well person, and it is even more difficult where the person to be treated is a child, in good health, and the idol of its doting parents.

It is, therefore, essential that the medical man should know just what his rights are in connection with vaccination, and just how far the school authorities or the health authorities may go in excluding unvaccinated children from the schools of the State.

Vaccination has long been recognized by various countries as a preventative measure and a safeguard against the ravages of smallpox. England has had a national vaccinating establishment, and penalties have been prescribed for every parent or person having the care and custody of a child born in the country who did not, within six months after the birth of such child, cause it to be vaccinated by the public vaccinator.

As early as 1807, Bavaria passed a compulsory vaccination act; Denmark in 1810, Sweden in 1814, and numerous other German states early in the nineteenth century.

In Massachusetts there is an act which compels parents and guardians to have children vaccinated before they are two years old, and provides a fine of five dollars for each year thereafter wherein vaccination is neglected.

Various cities have, for a long time, had in force strict ordinances in regard to vaccination.

Thus we find that, while vaccination is compulsory in comparatively but few States and countries, it is recognized in nearly all the civilized world.

The first statute of this state recognizing vaccination as a condition of allowing children to attend the public schools is found in Chapter 438 of the Laws of 1860, which gives to the local boards of the common school governments the right to exclude unvaccinated children from the public schools of the State. This act was the forerunner of the present provision of the Public Health Law upon the same subject, which is found in section 210 of such law, which was renumbered by chapter 667 of the Laws of 1900; and as this statute is one in existence today which requires the vaccination of school children, I shall quote it in full. It reads as follows:

> "No child or person not vaccinated shall be admitted or received into any of the public schools of the State, and the trustees or other officers having the charge, management or control of such schools shall cause this provision of law to be enforced. They may adopt a resolution excluding such children and persons not vaccinated from such school until vaccinated, and when any such resolution has been adopted, they shall give at least ten days' notice thereof, by posting copies of the same in at least two public and conspicuous places within the limits of the school government, and shall announce therein that due provision has been made, specifying it, for the vaccination of any child or person of suitable age desiring to attend the school, and whose parents or guardians are unable to procure vaccination for them, or who are, by reason of poverty, exempted from taxation in such district."

It is, therefore, quite clear that the Legislature has recognized vaccination as a preventative of the spread of disease, and has attempted to say, by the above statute, that children shall be denied the righ to attend the public schools of this State unless they have first submitted to vaccination.

The questions that at once occur to us are: May the Legislature do this thing? Is it within the letter and spirit of the Constitution? May the right to a common school education at the hands of the public be taken away from the children of the State?

If this statute is valid, it is valid as an exercise of the police power in one of the legitimate and most important functions of government, viz.: The preservation and promotion of the safety and health of the public. The police power unquestionably exists to enable the government to make such necessary restrictions touching the well-being of society as may become necessary, having regard only to the fact that citizens must be preserved from unjust and arbitrary interference.

In the case of Health Department vs. Rector, 145 N. Y., page 32, Judge Pechkam says in the course of his opinion: "We may own our property absolutely, and yet it is subject to the proper exercise of the police power. We have surrendered to that extent our right to its unrestricted use. It must be so used as not improperly to cause

harm to our neighbors, including in that description the public generally."

And what he says in regard to property rights might also be said in regard to personal rights. Again, in the same case, he says: "The act must tend in some appreciable and clear way toward the accompilshment of some one of the purposes which the Legislature has a right to accomplish under the exercise of the police power."

The act in question does, beyond doubt, deal with a subject with which the Legislature had an unquestionable right to deal—the subject of the public health. It is generally conceded (although there are still "Doubting Thomases" both in the medical profession and out of it) that vaccination does, to a greater or less extent, prevent the spread of one of the most contagious diseases known to the world, that of smallpox; and it must also be a matter of general knowledge that, where many children are gathered together, there could be no more easy way for the spread of contagion than through our schools.

The contention has been at various times made that the statute above quoted, or the one upon which it was founded, was unconstitutional, in that it violated Article 1 of Section 1 of the State Constitution, which provides that, "No member of this State shall be disfranchised or deprived of any of the rights or privileges secured to any citizens thereof, unless by the law of the land or the judgment of his peers;" or that it violated the provision of Section I of the Fourteenth Amendment of the Constitution of the United States, which is as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The courts, however, have disposed of these constitutional questions, so that there can no longer be any room for doubt upon the subject. We may answer the question which arose in our minds by direct, straightforward answers, and refer to decisions of the highest court in the State as our authority therefor. The Legislature may pass such an act, and when so passed the same is constitutional, and may be enforced.

First of all, it has been held that a common school education at the expense of the State is a privilege, rather than a right, and that, being a privilege, it is always subject to the discretion of the State, and might be granted or refused to any individual or class, at the pleasure of the State.

See People ex rel., King vs. Gallagher, 93 N. Y., 438.

To the same effect is the matter of Walters, 84 Hun, page 457.

In that case an application was made for a peremptory writ of mandamus, compelling the principal of Public School No. 22, in the City of Brooklyn, to admit two children to such school. Under the rules and regulations of the Board of Education, "when a child is presented for admission to a public school of this city, the principal shall require a physician's certificate that he or she has been satisfactorily vaccinated or has had the smallpox, or, in default thereof, shall exclude the child until such evidence is provided."

The avowed purpose of the proceeding was to test the constitutionality of the provision of the Public Health Law above quoted. The Court said, after citing King vs. Gallagher, above referred to: "It follows that the state can certainly exercise this discretion by debarring from attendance at the public schools such persons as are unwilling to adopt a protection which in the judgment of the Legislature is essential to the preservation of the health of the large body of scholars."

The Court, however, goes on to say: "To vaccinate a person against his will, without legal authority so to do, would be an assault."

It was contended in this case that the fact that there was in existence in this State a statute which compelled the attendance of children of a certain age upon the public schools of the State, would have the effect of obliging school children to submit to an assault upon the part of the authorities. The Court, however, did not pass upon that question, and it would, therefore, seem to remain undecided. I am, however, inclined to the opinion that, where the school authorities have passed the resolution provided for by Section 210, and persons not vaccinated are thereby excluded from the schools, that such resolution, arising as it does in the exercise of the police power and for the protection of the public health, would, while in force, prevail over the provisions of the Compulsory Education Law, and would, therefore, operate as an ample excuse for any child or children who might be arrested and brought before a magistrate, under the provisions of the act requiring attendance.

The question as to whether vaccination might be enforced, regardless of the right of attendance upon a public school; in other words, whether the health authorities might compel vaccination by force, is one that is not within the province of this paper, but I beg to call the attention of the health officers here gathered together to the significant language of Judge Bartlett as above quoted, viz.: "To vaccinate a person against his will, without legal authority so to do, would be an assault," and to warn them that, in my judgment, there must be a clear case of an existing epidemic, the public necessity must be great, and the person upon whom force is used in order to vaccinate must be one who has beyond question been exposed to the smallpox.

But, to return to my legitimate subject: The Court of Appeals

of this State has, in a case decided as late as October 18, 1904, upheld squarely the provisions of Section 210 of the Health Law as Constitutional and valid, and a reasonable and proper exercise of the police power.

This case is entitled Viemeister vs. White, President of Board of Education; et al., and is so far only reported in the advance sheets of the reports. As this is so recent and so important a decision, I shall quote freely from the opinion of Judge Vann.

The proceeding was one to compel the officers having charge of a public school in Queens County to admit a boy of ten years of age to the school without requiring vaccination. The Court said:

> "The question presented is whether the Legislature is prohibited by the Constitution from enacting that such children as have not been vaccinated shall be excluded from the public schools. The appellant claims that the Public Health Law places an unreasonable restriction upon the right of his child to attend school, and that it violates the section of the Constitution already quoted (Article IX, Section I, which requires the Legislature to provide for the maintenance and support of a system of free common schools wherein all the children of the state may be educated), as well as the general guarantees for the protection of the rights, privileges and liberties of the citizen. The respondents claim that the

object and effect of such legislation is the protection of the public health, and since that it is a valid exercise of the police power. The police power, which belongs to every sovereign State, may be exerted by the Legislature subject to the limitations of the Constitution, whenever the exercise thereof will promote the public health, safety or welfare. The power of the Legislature to decide what laws are necessary to secure these objects is subject to the power of the courts to decide whether an act purporting to promote the public health or safety has such a reasonable connection therewith as to appear upon inspection to be adapted to that end. A statute entitled a health law must be a health law in fact is well as in name, and must not attempt in the name of the police power to effect a purpose having no adequate connection with the common good."

And, again:

"When the sole object and general tendency of legislation is to promote the public health, there is no invasion of the Constitution, even if the enforcement of the law interferes to some extent with liberty or property."

And once more:

"The right to attend the public schools of the State is necessarily subject to some restrictions and limitations in the interest of the public health. * * * Smallpox is known of all to be a dangerous and contagious disease. If vaccination strongly tends to prevent the transmission or spread of this disease, it logically follows that children

may be refused admission to the public schools until they have been vaccinated. * * *

"The relator's son is excluded from the school only until he complies with the law passed to protect the health of all, himself and his family included. No right conferred or secured by the Constitution was violated by that law, or by the action of the school authorities based thereon."

We may, therefore, unqualifiedly assert that the statute above quoted, requiring all children to become vaccinated as a condition precedent to their attendance upon the public schools of this State, is valid and constitutional, and a proper exercise of the police power.

The fact should not be overlooked that there are many schools in this State which are not public schools in any sense of the word; and the question would then arise as to what extent children might be excluded from other than public schools. A careful examination of the decisions and the statutes would seem to show that there is no power on the part of the public authorities to compel children in attendance upon private schools to be vaccinated as a condition of such attendance.

It will be noted that Section 210, above quoted, applies only to public schools, and a public school, in the sense therein used, means the common schools of the State, supported at public expense and under public supervision. It would seem, however, that in cases of epidemic, or threatened epidemic, the health authorities might reach even such schools by compelling vaccination to prevent the spread of smallpox.

In order to warrant this, however, the facts must exist which would justify the order of the local health authorities requiring such vaccination. There must be smallpox in the vicinity, and the pupils of the school must either have been exposed to the disease or have been liable to exposure thereto.

It will be seen from the above that compulsory vaccination for school children has become an established fact in this State, and has the sanction of our highest court. While there may still be those who question the efficiency of vaccination, yet I think the majority will concede that this is a step in the right direction; if it tends, ever so little, to guard the health and welfare of the public, and prevents even in a small degree, the spread of that dread disease, the very mention of which pales the cheek of the bravest, it has accomplished much, and we owe to the Legislature which passed the act requiring such vaccination, and to the court that upheld it, a vote of thanks for what they have done in the way of bettering the welfare of the people of this great State.—Medical Review of Reviews.

THE POWERS AND DUTIES OF THE MUNICIPALITY IN THE CONTROL OF TUBERCULOSIS.

By George W. Webster, M. D.
President of the Illinois State Board of Health, Chicago

An eminent historian, in commenting upon the changes which have taken place in the development of the modern city and modern city life, draws a vivid picture of the almost unknown world in which Washington would find himself, were he to visit our modern city today. He says, "He never saw a flagstone sidewalk nor an asphalted street, nor a pane of glass six feet square. He never heard a factory whistle; he never saw a building ten stories high, nor an elevator, nor a gas jet, nor an electric light; he never saw a hot air furnace nor entered a room warmed by steam; he never struck a match, nor sent a telegram, much less a Marconigram, nor spoke through a telephone, nor touched an electric bell; he never saw a horse-car, nor an electric car, nor an omnibus, nor a ferry-boat. He never saw a nickel, an automobile nor a bicycle."

It is these marvelous changes of the past hundred years which have called our present municipal governments into existence and confronted them with new problems for solution.

Before proceeding further, I beg your indulgence while I call attention to a few fundamental propositions: propositions which may seem trite, but which will bear repitition: First, where are Public Health Powers lodged? Second, what are these powers? Third, How should these powers be exercised? In a word, what is the duty of the municipality in public health matters, and more especially, what should this municipality of Peoria do in regard to this one point in preventive medicine: the prevention of Tuberculosis?

In dealing with the first question, it becomes necessary to revert to a few fundamental principles and distinctions that apply to all forms of government. Obviously, in all forms of government, power must be lodged somewhere, and upon the seat of its lodgement depends the form of government. In a pure democracy, all power resides in the people; in an absolute monarchy, it resides in the ruler or king.

Without consuming time to deal with the modifications of these two generic forms of government, it may be said that, in any form of government, the exercise of a power not clearly derived in accordance with the principle just stated, is illegitimate and, therefore, revolutionary and dangerous. It follows, therefore, that a public health power, in order to be legal, must be logically and legitimately derived from the source of power existing in the form of government of which it is a function.

All concede that after the independence of the States was achieved and before the formation of the Union was accomplished, all govern-

mental powers of all kinds, including of course, public health powers, must have resided in the States or in the people thereof.

By the adoption of the Federal Constitution a National Government was created, and to it certain powers were delegated, the powers so delegated being specifically enumerated. Unless it can be pointed out in the Constitution that public health powers were surrendered to the National Government, they must remain in the States where they originally belonged. It may be safely asserted that no clause in the Constitution can be pointed out that transfers public health powers from the State to the Nation, hence the conclusion is irresistable that they still belong to the States.

The Supreme Court of the United States has affirmed, that while power to regulate interstate commerce does belong to the National Government, power to regulate public health does not so belong, the two powers being entirely separate and distinct.

The Tenth Amendment to the Constitution, adopted soon after the ratification of the States, reads as follows:

> "The powers not delegated to the United States by the Constitution, and not probibited by it to the States, are reserved to the States or to the people."

In the face of these plain, strong words, and by applying the above law, we are able to formulate the definite and incontrovertible proposition, namely, that all powers not specifically or impliedly conferred on the National Government are reserved to the States. This includes public health powers.

All public health powers are a part of the "Police Power" of the State, and Chief Justice Shaw defines "police power" as "the power vested in the Legislature by the Constitution to make, ordain and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth, and of the subjects of the same."

Ex-Governor Hamilton says, "the police powers of the State are plenary and inalienable, co-extensive with the natural right of self-protection, their exercise is demanded by the 'law of overruling necessity'; they are the foundation of all laws and regulations for the well-being or government of the people, and especially of all laws, ordinances, rules and regulations for the preservation of the health or safety of the community." Chapter 24, Section 62, of the Revised Statutes of Illinois, give city councils in cities, and Boards of Trustees in villages the power to appoint a Board of Health and prescribe its duties and powers, to "do all acts, and make all regulations which may be necessary or expedient, for the protection of health or suppression of disease." Concerning the force and effect of this power, the Supreme Court of Illinois says, "when an incorporated town or

eity has been invested with power to pass an ordinanee, by the Legislature, for the government or the welfare of the Munieipality, an ordinance enaeted by the Legislative braneh of the corporation, has the same foree and effeet as a law passed by the Legislature, and cannot be regarded otherwise than as law of and within the eorporation. An ordinanee is the law of the inhabitants of the Munieipality." Judge Dillon says, "Our Municipal corporations are usually invested with the power to preserve the health and safety of the inhabitants. This is indeed one of the ehief purposes of loeal government."

Prior to the adoption of the Constitution of 1870, the plan of munieipal self-government was patterned on that of the New England Town Meeting, but there was eonsiderable difference in details. Henee the only speeial eharters of eities which now exist in Illinois are those granted prior to the adoption of the Constitution of 1870. It thus seems to be elearly established that the City of Peoria is elothed with the power and eharged with the duty of doing all things that may be neeessary or expedient to preserve the lives of its eitizens.

The broad general prineipal upon whieh all modern sanitary legislation rests, is that every memebr of the eommunity is entitled to proteetion in regard to his health, just as he is in regard to his liberty and property, and that, on the other hand, his liberty and his eontrol of his property are only guaranteed to him on the condition that they shall be so exercised as to not interfere with the similar rights of others, nor be injurious to the health of the community at large.

The sanitary rights of the people depend to a large extent upon what Hobbs describes as "that law whieh men are bound to observe beeause they are members, not of this or that community, but of a eommunity," and these rights and the obligations eonneeted with them, can be defined with reasonable elearness and pereision, whence it follows that they are proper subjects for legislation, whenever sueh definition beeomes expedient.

The publie control of matter pertaining to the health of the eommunity is a comparatively new idea, and Bagehot said, "there is no pain like the pain of a new idea." It seems to run eounter to their ideas of what they are pleased to term "personal liberty" and to savor too much of what they call "paternalism." Nevertheless, it is my opinion that what is now done in the way of prevention of disease, is the standard by whieh we measure and indicate the degree of intelligence and progressiveness of a eity like Peoria, and this discussion here shows that you fully understand your obligations, and, I am sure you will do your whole duty, realizing that even from an economie standpoint, the prolongation of life by the suppression of preventable disease is of much greater value to the state than the eost of the means employed; and also because you realize that to ward off the calamity

of disease and to prevent the spread of a pestilence is to increase the sum of human happiness and to elevate the race.

The municipality should be organized as follows: First, enact the necessary legislation; in other words, pass the desired ordinances, after studying the ordinances of such cities as New York, St. Paul, and Boston, asking the heads of the Health Departments of said cities to point any defects which have been found to exist. Such an ordinance should provide for the following:

First, compulsory notification and registration. In the campaign of prevention, the first requisite is a knowledge of conditions. In 1782 a method was devised by the City of Naples which has never been improved upon. The law required physicians to report to the authorities all cases of consumption within their knowledge, with a fine of 300 ducats for the first offense, and a penalty of ten years banishment for the second.

In my address before the Illinois State Medical Society in this city several years ago I said: "The fourth point on which wise legislation will be of great value in preventing disease and saving life is that of compulsory notification to the proper authorities, of the existence of all tuberculous disease. This is a radical step, in some respects in advance of the times, and yet I am firmly convinced of its efficiency and wisdom, and ultimate adoption. It should be clearly understood by all at the onset that such methods are not for the purpose of imposing any additional burdens upon the sick, nor of curtailing their personal liberty or infringing their personal rights. While it is primarily to secure to the well that protection which they have a legal right to demand, the greatest benefit will accrue to the sick. They will be furnished with the latest and best information and advice in regard to the best methods of treatment and curing their malady, thus enabling them to minimize the dangers of infecting the members of their own families; and it will enable them to secure outside aid when needed"

In addition to the foregoing, I pointed out the advantages of compulsory notification. Time has served to confirm and strengthen the views then expressed.

The victim of tuberculosis is an anomaly in our public health system of charities and belongs to the only class for which no intelligent, adequate provision is made. Just why the Board of Health should be denied information in relation to this one disease is quite beyond my comprehension. Possibly it is because the feeble attempts at prevention have been limited in scope and feebly supported or even opposed by the medical profession. For example, in Philadelphia, a compulsory notification bill was presented to the Board of Health twelve years ago, with every prospect of adoption, when a delegation from the Medical Department of the University of Pennsylvania,

appeared at the meeting and overawed the Board, by weight of authority, into rejecting it. Possibly it is because of a want of exact and reliable information in regard to it on the part of the people.

It is not alone in far-off Philadelphia, many years ago, that physicians high in authority and of high professional attainments have opposed this measure.

No longer ago than October 25, 1904, one of the most prominent men in the profession in your city raised many arguments in opposition to the reporting of cases of pulmonary tuberculosis.

First, he attempted to frighten the physician with the danger of a damage suit, citing the case of Dr. Playfair, of London, who was made defendant in a $25,000 damage suit for divulging the physical condition of his patient. Had the doctor known the law of Illinois, he would have known that there is no such thing as "privileged communications" in this State.

Then he spoke of adenitis. I am sure there would be no object in reporting those cases, as they are not infectious; but, on the other hand, there can be no objection to reporting them. They would not be "branded," as he says, and they would be in a position to receive instruction, and, if need be, pecuniary assistance; they would be educated in correct habits of temperance, taught to live right, and thus saved to the State. He seems to convey the idea that it is necessary to "brand" the patients publicly, to publicly expose the afflicted one to the public gaze, as we do when we placard a house where smallpox exists. This is not the idea at all. Reporting these cases and registering them in no way exposes them to publicity; their names will not appear in the public prints, no placard will be placed on the house, they will not be approached only through the family physician, and, so long as he and the patient fulfill their obligations to society by doing their duty, taking all necessary steps to protect others and prevent the spread of the disease, they are not interfered with in any way. The moment either one dares to disregard his moral obligations to his neighbor, then let him become amenable to the law. Why do we house our lunatics in costly asylums? Why do we maintain a penitentiary for some of our fellow men at Joliet? Why do we send our smallpox patients to the pest house? In all cases it is primarily for the protection of the public, because it is a fundamental principle that no citizen shall be a menace to the "life and liberty and the pursuit of happiness," which is the inalienable, constitutional right of every citizen of our country. Why should the victim of tuberculosis be sequestered and hidden and the nature of his affliction be kept a secret any more than the insane, the smallpox patient or the escaped wife murderer? If he is clearly a menace to others and refuses to obey just as any other law breaker. So long as he is reasonable he should be unmolested, but if too poor to comply with the law, he should be

helped by being well taken care of in a suitable place where he can get well and at the same time not be a menace to others.

At the same meeting one of your physicians asked the question, "Has the State the right to demand a report from a physician without compensation?" Technically, no; although the Supreme Court of Connecticut has decided that physicians can be compelled to report without pay. Some States pay ten cents. Unfortunately, ladies and gentlemen, there are men in our profession, I said in, not of, who are glad to hide behind any technicality, rather than do their duty as men. They will call a case "bronchial trouble," or anything else you ask them to call it, just because they are moral cowards and are afraid you will dismiss them if they tell the truth. These same men call typical smallpox "Illinois scratches," "Cuban itch," "Impetigo," or anything else, because they are moral cowards.

No, you can't compel a citizen of this grand and glorious country of ours to do something for nothing. You should not compel me to come all the way from Chicago at my own expense to talk to you on this subject, and perhaps make a few good healthy enemies, but I was only too glad to come simply that I might in some small degree discharge my duty as a citizen and a physician.

Thank God, from Warren at Bunker Hill and Rush at Valley Forge to Lazear and Reed in Cuba, there has been an unbroken line of patriot physicians who have laid down their lives for their country, and they never asked, has the State the right to demand this; and yet, no recompense can reach them. Humanity and time remain their everlasting debtors.

I am strongly in favor of compulsory notification, of all cases of tuberculosis in the infectious stage. The public should demand the same protection from tuberculosis that it receives in regard to other diseases. Emotional objections in favor of concealment, fatal delay and selfish interests should be swept aside and we should impress upon the people the responsibilities of citizenship, not merely to the end that the Board may compile uninteresting statistics and make horror-inspiring pictures of "lung blocks," but to the end that the best interests of the patient, the family and the public will be safeguarded by prevention, and prevention is the keynote of the whole effort, indeed, prevention is the whole question. As the result of voluntary notification begun by the Board of Health of New York in 1894, and of compulsory notification since 1897, the mortality from tuberculosis has been reduced by 40 per cent. Dr. S. M. Miller reports the number of deaths for tuberculosis in Peoria in 1902 as 90. This would mean a saving of 36 lives per year, almost one human life each week.

House Disinfection.—The contagion of tuberculosis is of a kind by itself, in that its most striking peculiarity is that it depends almost entirely upon the house. Dr. Flick calls the house the "granary of

the tubercle bacillus outside of its host." Consequently, after death or removal, thorough disinfection should be undertaken by the health authorities in all cases. Where this is done by the landlord it should be under the supervision and in accordance with the rules of the Department of Health, and a suitable penalty for violation should be provided. Also placarding of the house until the rules are complied with. Such disinfection should include not merely the ordinary formalin or sulphur fumigation, but should provide for painting woodwork, walls, etc. Such municipal legislation should include an anti-spitting ordinance, and should regulate the cleaning and sprinkling of streets.

Provision should be made for the inspection of meat and milk, as the fact that bovine tubercle bacilli may cause the disease in man, has been surely proved. Tuberculous pupils and teachers should be excluded from the schools, and, to this end, medical inspection of schools should be provided for.

Tenement house inspection should be provided for, as this is essentially a house disease. Three-fourths of all cases are cases of house infection. Factory inspection might be included.

Dispensaries for our patients should be provided, and a special ward should be provided at the hospital and provision should be made for free examinations of both patients and sputum, in order to encourage early diagnosis and intelligent co-operation. In all cases the ordinance should be explicit in defining the scope of authority conferred and should make ample provision for its compulsory enforcement. Moral suasion is all right in some cases, and yet I notice that you maintain a police force for the purpose of clubbing into submission all those who are clearly violating the law and who are not amenable to any other form of argument.

But legislation and even notification and disinfection are not enough. If you place your dependence upon these and these alone, you will fail. Along with these you must have an efficient Commissioner of Health, who should be free from the vicissitudes of partisan politics; of such a high order of efficiency as to deserve and receive both public and professional confidence, well worthy of being trusted with all information in regard to tuberculosis or any other disease; and who will not only do his own work well, but will see to it that his subordinates are equally conscientious and trustworthy.

Working in perfect harmony with him should be your charity organizations your women's clubs, your literary and social and labor organizations, your teachers in your schools and your preachers in your pulpits, the public press, all working together and carrying on an intelligent educational campaign, all backed up by an enlightened public and professional sentiment and by public and private appropriations for carrying on the work.

Each patient should be so educated in regard to his disease and its prevention, that, instead of being a menace to those about him, he will become the center of an educational influence that will save at least three or four of his friends. This is not the dawn of the millinium nor the dream of an enthusiast. It has been accomplished elsewhere, and it can be accomplished here.

"One bugle note, one battle call,
One single watchword, Duty, that is all."

—Chicago Clinic and Pure Water Journal.

CRIMINAL RESPONSIBILITY OF INEBRIATES.

T. D. Crothers, Hartford, Conn., concludes from his studies on the subject that alcohol produces changes in the brain and nervous system, impairing responsibility, and that the state in considering them sound and responsible fails in its object to prevent crime and to protect society through the law. Statistics and experience prove, he holds, that the fear of punishment fails to affect these cases. The death penalty should never be inflicted on inebriates for crime committed under the influence of alcohol. Capital punishment, in such cases, favors a contagion of crime in other persons similarly affected. The excessive use of alcohol should be accepted, he maintains, as evidence of mental impairment and of inability to control conduct Crothers states that physicians who are called on to give evidence regarding the sanity and responsibility of inebriates should be governed by the facts of the neurotic heredity and by the liquor and drug history.—Journal of A. M. A.

PHYSICAL DEATH FOURTEEN YEARS AFTER LEGAL DEATH.

After having been dead de jure for 14 years, Charles H. Smith, a former partner of the late Governor Pingree, of Michigan, was declared to be dead de facto on Saturday by the doctors of St. Vincent's Hospital, New York. The man had been a guest at the Mills Hotel on Bleeker Street for 15 years. He disappeared from Detroit in May, 1890, after withdrawing large sums from the shoe firm of Pingree & Smith. A little more than a year later the Probate Court declared him to be legally dead, but not long after Mr. Pingree discovered the whereabouts of his former business associate, and contributed to his support until his death.—American Medicine.

SHIP NOT LIABLE FOR MALPRACTICE.

The United States District Court in New York holds (The Napolitan Prince 134 Federal Reporter, 159) that the errors, mistakes or negligence of its official physician in treating a passenger for an injury were not imputable to a ship, it not being shown that the ship was negligent in selecting them.

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MALPRACTICE INSURANCE AND MEDICAL DEFENSE.

FORT WAYNE, IND., April 11, 1905.

TO THE EDITOR:—In The Journal, April, 1, 1905, is an editorial commenting on the recent opinion of Attorney-General Mullan, of Iowa, in which he held that "physicians can not take out insurance in that state against malpractice suits." You state that "considering the fact that probably nine-tenths of all malpractice suits are pure blackmail, instigated by quacks and foraging lawyers, the finding seems to be a peculiar one." The opinion does not seem to us a peculiar one. It is the only rational opinion which could have been rendered, and but confirms the opinions of attorney generals of a number of other states.

The "physicians' liability policies" issued by causalty insurance companies purport to defend any malpractice suit brought against the policy holder, and in the event of a judgment being rendered against the physician, to pay the same within the limits provided in the policy. This indemnity feature of the insurance contract makes it against public policy. The policies are written and the subject is treated by the insurance company as an "accident." It is through this misapprehension of the subject that the insurance companies began the issuance of such policies.

Malpractice is not an "accident." The courts have held: "An accident is defined as a happening of an event without the aid and design of a person and which is unforseen, and in this sense the word

is to be understood in the absence of a plain, unequivocal exemption and provisions, in a policy insuring against injury or death caused by accidental means." Malpractice is the "bad professional treatment of disease, pregnancy or bodily injury, from reprehensible ignorance or carelessness, or with criminal intent,"

If a physician charged with malpractice can show that the injury complained of was the result of an accident, a result not to be expected and for which, therefore, he could not prepare, or, if possessing the requisite qualifications and applying his skill and judgment with ordinary care and diligence, an honest mistake or error of judgment occurred, he can not be held liable, be the results what they may. The medical practitioner is not an insurer or a guarantor of results. All that he is required to do is to bring to his assistance the ordinary knowledge learning and skill possessed by the average practitioner in similar localities and to exercise his best judgment. If, however, he is incompetent, and does not possess the ordinary knowledge and skill of the average practitioner, or if he is negligent or unskillful in rendering his services, or fails to exercise his best judgment and injury results, he can be held responsible in damages.

Indemnity, therefore, is not a protection to the reputable, competent and careful practitioner. Possessing the requisite knowledge and skill, applying his skill and judgment with ordinary care and diligence, he can not be held liable for any untoward results. What he does need when assailed by the blackmailer under the guise of malpractice is a vigorous and competent defense which will vindicate his diagnosis, treatment and work. For the negligent, incompetent, unskillful and quackish practitioner, indemnity is a multum in parvo. Having no professional reputation at state and practicing strictly for the money there is in it, he will undertake to render serivces for which he is incompetent and unprepared, will guarantee results and can even neglect with impunity his patients, relying on the insurance company to pay the bill.

The state holds as its most valued possession the health of its citizens, and anything which will have a tendency to relieve one from responsibility imposed by common law or statute in the treatment of disease or injury, is against public policy. Organized defense is recognized as not being against public policy, but as a necessity for reputable practitioners. This fact is shown in the admission and authorization of the Physicians' Defense Company as a foreign corporation in Iowa. Before this company received its certificate of authority from the secretary of state of Iowa, the attorney general reviewed its charter and the defense contracts which it issues, and rendered his opinion that the company is not an insurance company, that its contracts are not insurance policies, and that it could be admitted as a foreign corporation and that its contracts for the defense of physicians, surgeons and dentists are legal contracts under the laws of Iowa.

From the foregoing it is clear that while Attorney-General Mullan's opinion holds the issuance of "physicians' liability policies" to be illegal under the law on account of the payment of judgments, yet the state is not opposed to organized defense.

—J. A. M. A. E. H. Merritt.

Judicial Decisions.

Under this heading will be presented each month information relative to judicial decisions affecting the medical profession.

GIVING EDDYITE TREATMENT IS PRACTICE OF MEDICINE.

The Supreme Court of Ohio holds, in State of Ohio vs. Marble, that the giving of "Christian Science" treatment, for a fee, for the cure of disease is practicing medicine within the meaning of the statute regulating such practice in this state. The statute making it a misdemeanor to give such treatment for a fee is not an interference with the rights of conscience and of worship, conserved by section 7 of the bill of rights, and is not on that ground unconstitutional. Legislation prohibiting any one from treating a disease for a fee, excepting such persons as have qualifications, is a valid exercise of the police power of the state, and is constitutional. The act regulating the practice of medicine in this state exacts reasonable qualifications and excludes no one possessing them, and it is not void as discriminating against Eddyites in that it prescribes that any one possessing certain qualifications may practice osteopathy and does not make especial provision for those who wish to practice Eddyism.

The court says that the right to practice medicine has been so long and so universally subject to state regulation that it might almost be said to be not an absolute right, but a privilege or franchise. Assuming, however, that it is an absolute right, it was conceded to be subject to such reasonable regulations or conditions as the state in the exercise of the police power may prescribe. The Ohio statute provides that "Any person shall be regarded as practicing medicine or surgery or midwifery within the meaning of this act, who shall use the words or letters 'Dr.,' 'Doctor,' 'Professor,' 'M. D.,' 'M. B.,' or any other title in connection with his name, which in any way represents him as engaged in the practice of medicine or surgery or midwifery, in any of its branches, or, who shall prescribe, or who shall recommend for a fee for like use any drug or medicine, appliance, application, operation or treatment, of whatever nature, for the cure or relief of any wound, fracture or bodily injury, infirmity or disease." It was contended that the word "treatment" was to be given its meaning as used in the practice of medicine and that as so read it means the application of remedies to the curing of disease, that a remedy is

a medicine or appliance or process; that process is an action or operation and that prayer for the recovery of the sick is neither, Technically this may be correct, but the scinece of medicine has made some advance since the time Macbeth wished to throw physic to the dogs because his doctor could not cure a mind diseased but told him "Therein the patient must minister to himself." Nowadays physicians cure imaginary diseases by means that would as easily as Eddyism escape the above definition. What Eddyism is we do not know. The practice of it is referred to as treatment by its followers. If its followers call it treatment they ought not to be heard to say it is not. Dr. O. W. Holmes (Med. Ess.) says: "Disease is to be treated by anything that is proved to cure it." The statute in this case had been held in this court not to comprise the practice of osteopathy and by a lower court not to apply to Eddyism. So that the use of the words "of whatever nature" in the amendment are quite significant and this court has no doubt the legislative intent was to bring within this definition every person who for a fee prescribed or recommended a cure for disease even though the cure was to come not from himself but, through hi : intercedence, from God. The next contention was that the statute interfered with the defendant's right to worship God according to the dictates of his conscience. The Supreme Court says it is to be observed that the statute does not prohibit the prescribing or recommending the treatment except for a fee and the court is not advised that it is a part of the defendant's religion to exact a fee as well as to pray. But if the inhibition of the statute tends to the public welfare and is not obnoxious on other grounds it is not within the provision of section 7 of the bill of rights that "All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience . . . nor shall any interference with the rights of conscience be permitted."

Taking up the question of whether the act, in so far as its application to Eddyism is concerned, is a valid exercise of the police power, the court says that the practice of medicine may be regulated by legislation has been decided in every court in which the question has arisen. But it is said that the offering of prayer to God for the recovery of the sick is not against public health or public morals or public safety or public welfare. Admitted. But is that a correct statement of the case? If the defendant prayed for the reocvery of Hehl that was the treatment he gave him for the cure of his rheumatism and for which Hehl paid him. He was practicing healing or curing disease. To assume that legislation may be directed only against the administering of drugs or the use of the knife is to take a too narrow view. The subject of the legislation is not medicine and surgery. It is the public health or the practice of healing. The state might make it an offense, as has been done in New York, for any one to omit to furnish medical

attendance to those dependant on him, and at the same time leave him his liberty to die in any manner he may choose. But this is not all. While the state may not deem it wise to go to the extent of requiring the individual to avail himself of the services of a physician yet it may not wish to hasten his death and so to transfer to itself the burden of supporting those dependent on him by making it possible for him to employ an empiric.

Again, where there is an infectious or contagious disease and the public welfare may be vitally affected by a failure promptly to recognize it, and so the state is interested in permitting to practice the art of healing only those possessing recognized qualifications. So that, regarding disease rather than the treatment of it as the subject of the legislation, it is not necessary that the statute be preventive of particular practices, but it may make the right to undertake the treatment of disease dependent upon the possession of reasonable qualifications. Then it was contended that Eddyism is a recognized system or school of healing, and that the statute is unconstitutional, on the ground that it discriminates against Eddyism, or in favor of certain schools of medicine. The court says that if it is correct in the conclusion that disease and not the method of its treatment, is the subject of the legislation, then it is putting the cart before the horse to say that every school of healing must be recognized. That the legislature, in its wisdom, might prescribe a uniform examination the court does not doubt, and that it may recognize one school without recognizing all, is also true, if the recognition be in the exercise of proper classification and for the public welfare, and not with a view to create a monopoly in the schools recognized or a discrimination against other schools. The court fails to find anything in the present act that discriminates against Eddyism It does not provide for a special examination and limited certificate for the Eddyite practitioner, but he may obtain a certificate to practice medicine upon the same conditions as any other person and there is nothing in the act requiring him to use the knowledge after he acquires it. To admit that a practitioner may determine what treatment he will give for the cure of disease and that the state may examine him only respecting such treatment would be to defeat the purpose of the statute and to make effective legislation of this character impossible. If the present statute is too comprehensive the remedy is with the legislature. The conclusion reached is supported by state of Nebraska vs. Buswell, 40 Neb. 158, and the following recent decisions throw more of less light on such legislation: The People v. Blue Mountain Joe, 129 Ill., 37L; Williams v. The Peolpe, 121 Ill. 84; The People v. Gordon, 139 Ill. 560; Bragg v. The State, 134 Ala. 165; The Satte of Iowa v. Barr, 112 Iowa, 466; The State of Kansas v. Wilcox, 66 Kan. 711; State of Maine v. Bohemier, 96 Me., 257; People v. Reetz, 127 Mich., 87; State v. Biggs, 133 N. C, 729; 98 Am., St. 731, monographic note. State v. Heath, 101 N. W., 429.—J. A. M. A.

CONSENT TO POSTMORTEM EXAMINATION CONSTRUED.

The Supreme Court of Iowa says, in the case of Winkler vs. Hawkes and others, an action brought by a widow to recover for physical and mental anguish alleged to have been caused by the wrongful mutilation of the body of her husband and the removal of some of its parts, that it fully appeared that she understood the purpose of the examination was to ascertain the cause of her husband's death, and that she consented to it for that purpose. The consent being given, the Supreme Court thinks it must be held to imply a permission to the surgeons to conduct such examination in the approved and usual manner practiced by their profession; and, if the removal of some of the organs for microscopic examination was necessary or proper to effect the purpose of the postmortem, then the defendants would not be guilty of an actionable wrong in so doing, unless such permission was expressly withheld at the time the consent to open the body was given. It was true that the plaintiff claimed she made it a condition of her consent that none of the parts should be taken away, but that question was submitted to the jury, which evidently found against her contention in this respect. Moreover, the condition that none of the parts should be taken away did not necessarily prohibit the taking of such parts to the office of the surgeons for examination, if they were duly returned and replaced for burial, and this appeared to have been done. The fact seemed to be that the surgeons removed the heart and lives, in whole or in part, from the body, and took them from the undertaker's room for further examination; and, on hearing that the plaintiff objected thereto, the parts were at once returned and buried with the body. There was no indication that the surgeons acted otherwise than in entire good faith, and the court believes that their acts in the premises were fairly within the scope of the consent which the plaintiff conceded that she gave.—J. A. M. A.

LAW AGAINST OWNING OR MANAGING OFFICE UNCONSTITUTIONAL.

The Supreme Court of Washington holds, in the case of State vs. Brown, of considerable importance, in principle, to the medical profession, that the police power of the state does not authorize the enactment of a statute requiring examination by and license from a dental board before one may "own, run, or manage" a dental office. It says that it is solicitude for the physical well-being of the public, or that portion that may need dentistry work, which justifies that part of the statute providing for the examination and licensing of those who desire to "treat diseases or lesions of the human teeth or jaws, or to correct malpositions thereof." To perform such work with safety and with proper regard for health and comfort, the operator must possess technical knowledge and skill peculiar to the study and practice of den-

tistry. Can the same be said of one desiring to own, run, or manage a dental office? The court thinks not. To own and run property, it says, is a natural right, and one which may be restricted only for reasons of public policy, clearly discernable. To hold this portion of the statute valid would be to make possible conditions which were never designed to exist. To illustrate: Suppose a man thoroughly qualified and legally licensed as a dentist should die, leaving a perfectly and completely equipped dental office to his widow, who knew nothing of dentistry and was incapable of securing a license. By continuing to own this property any appreciable time she would become liable to prosecution under this part of the statute. Can the police or any other power be constitutionally invoked to produce such a result? The court is led to believe not. Carry the illustration a little further: The widow, not being able to sell the dental office to advantage, decides to hire competent and legally licensed dentists to treat patrons of the office, and undertake the management herself—paying bills, collecting accounts, arranging credits, making appointments, and doing other acts necessary to the supervision and control of the business affairs of the concern. Then she becomes a criminal, if this portion of the statute have virtue, because she has managed a dental office. And yet it will scarcely be contended that any of these acts injuriously affect "the health, good order, morals, peace, or safety" of society, or menace "the lives, limbs, health, comfort, quiet, or property" of the patients treated in such office. Many similar illustrations will readily occur to the mind given to the contemplation of the natural results reasonably to be anticipated under the operation of such a statute. Should the owner or manager hire operators not legally qualified, or should they participate in the treatment or operations mentioned in the other portion of the statute, they would, of course, be amenable to and punishable under those provisions. But the court is unable to say or to perceive that the health, moral, or physical welfare of the public, or any of the personal or property rights of its individuals, are endangered by the ownership and management of a dental office, so long as those employed therein to do the actual dentistry work are qualified and licensed as by law required.—J. A. M. A.

LIABILITY FOR CURE OF SMALLPOX PATIENTS.

The Supreme Court of Iowa says, in the case of Resner vs. Carroll County, an action brought by a physician to recover for services rendered in caring for a smallpox patient in 1902, that the statute in force at the time the services were rendered and the bill approved and presented to the county board provided that persons found to be afflicted with smallpox should be taken charge of and cared for by the local board of health, the expenses thereof to be charged to such person, or those liable for his support, if able; otherwise such expense to be

charged to the county. Code 1897, section 2570. And under the statute as it then stood the power to fix the fees or charges—those of the physician, for instance—was in the local board of health. The county board had to regulate such fees or charges. Its duty was to order the same paid as audited and approved by the local board. It followed that when the local board met and approved the bill of the plaintiff, and it being true that the patient and those liable for his support were unable to pay, the indebtedness against the county became absolute. And this was true without reference to certification, or the want thereof, to the county board. The state bound no one by its action in allowing a portion of the bill and rejecting the rest. As the demand of the plaintiff against the county was of a fixed and definite sum, he waived no right by taking the amount allowed. He had no conference with the board, which alone was authorized to act on the part of the county, and the acceptance of part of a fixed sum due did not operate to bar a claim for the balance unless mutually agreed, and on consideration. In the case of an unliquidated demand a different rule may obtain.—J. A. M. A.

PHYSICIAN, CONSULTED FOR EXAMINATION ONLY, AS WITNESS.

The Supreme Court of Wisconsin says that, in James vs. state, a child who was alleged to have been raped was taken by her mother to a physician a few days after the alleged offense, to be examined for the purpose only of determining whether she then had a venereal disease, it appearing that the party accused of committing the rape was suffering from that disease at the time of the alleged offense. The physician was called on the stand and was allowed to testify, against objection, as to the results of his examination, and this ruling was assigned as error on the ground that the information obtained by him was privileged under section 4075 of the Revised Statutes of Wisconsin of 1898. But the Supreme Court holds that the ruling was correct, because such information was privileged only when required and obtained for the purpose of enabling the physician to prescribe for the patient as a physician or to act as a surgeon.

PRINCE FERDINAND'S CORSET EDICT.

Prince Ferdinand, of Bulgaria, has signed an edict of the Minister of Public Instruction, directing that from now on girls and young women attending the public schools throughout the principality shall be prohibited from the wearing of corsets. The ground given for this new law is the health of the young women.—American Medicine.

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JUNE 1905

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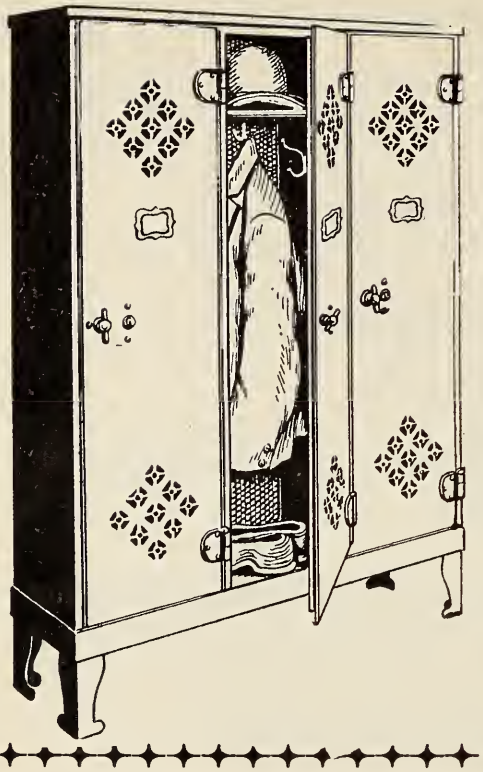

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I practice under the.....School of Medicine; and have been duly Registered and Licensed to practice

in this county, under the Laws of this State. Certificate No.....from the.....

I agree that this contract shall not cover suits for damages in which services were rendered while under the influence of liquors or drugs.

I agree to notify the Company at once by telegraph or telephone when demand is made, or suit commenced for damages, and will not make nor contract any expense without the written authorization of the Company, and will contribute my own time and assistance in defense of the case without charge to the Company.

I warrant each and all of the statements made herein to be true and complete. I also warrant that this application has been made and written by myself or duly authorized agent and that I understand its provisions

Date.....190... (Applicant's Signature).....

* Cross out professions not practiced.

Received H. O. *Issued*

CAPITAL STOCK $100,000 NUMBER INCORPORATED UNDER THE LAWS OF INDIANA

The Physicians Defense COMPANY

FORT WAYNE INDIANA

Long Distance Telephones: BELL 45 HOME, 1338

In Consideration of the written and printed application, which is hereby made a part of this contract, and the sum of Fifteen Dollars, receipt of which is hereby acknowledged, being the consideration for one year's defense, and the further payment of Fifteen Dollars annually in advance on the ____ day of ____ of each year during the life of this contract,

The Physicians Defense Company
(HEREINAFTER KNOWN AS COMPANY)

hereby agrees to defend the legally qualified Physician,

_____ of the City of _____, County of _____, State of _____ against all civil suits for damages for malpractice, based on professional services rendered by himself or his agent during the term of this contract, at its own expense, not exceeding FIVE THOUSAND DOLLARS in defense of any one suit, nor exceeding in the aggregate TEN THOUSAND DOLLARS in defense of suits based on services rendered by the holder hereof, within one year from the date of this contract, or within any one year for which this contract shall be renewed, all in the manner and upon the conditions herein below stated, to-wit:—

Immediate notice by telegram must be given the company at the Home Office at Fort Wayne, Ind., of any suit brought or demand made, and the holder hereof shall immediately forward the summons, or other process served, and the complaint or petition filed, together with a full and complete history of the case and services rendered.

Upon receipt of notice from the holder hereof that a suit has been commenced against him, for damages for civil malpractice, the company will employ a local attorney in whose selection the holder hereof shall have a voice, who, together with the company's attorney, will defend the case without expense to the holder hereof.

Such defense will be maintained until final judgment shall have been obtained in favor of the holder hereof, or until all remedies by appeal, writ of error or other legal proceedings shall have been exhausted, or until the sum of Five Thousand Dollars shall have been expended in said defense; provided said company shall not be under obligation to expend more than Ten Thousand Dollars in the aggregate in the defense of suits based on services rendered by the holder hereof, during the original one year term or any renewed one year term of this contract.

Said company does not obligate itself to pay or to assume or to secure the payment of any judgment rendered against the holder hereof, in any suit defended by it.

The company shall not compromise any suit or claim for malpractice against the holder hereof. Nor shall the holder hereof, after the company has entered upon the defense of any such suit in behalf of the contract holder, compromise the same without the consent of the company in writing first thereto had, and by reimbursement of the company its expenses theretofore incurred.

No suit or claim will be defended by this company, under this contract, in which the cause of action arose previous to the date of this contract.

This contract does not cover criminal prosecutions nor suits for assault, criminal abortion, foeticide, homicide or other criminal act, or actions arising by way of counter-claim or recoupment.

The company may cancel at any time the unexpired portion of this contract upon written notice mailed to the holder hereof, and the unearned portion of the consideration therefor shall be returned to the holder hereof.

This contract does not take effect until the consideration therefor shall have actually been paid to the company or its authorized agent; but if the holder shall have paid such consideration and shall have received from the company or its duly authorized agent a memorandum certifying such payment and that the contract is to be subsequently delivered, then this contract shall be dated as of the date of such payment and shall be in force and effect from that date.

This contract shall not lapse at the end of the time as stated above if the holder hereof shall pay the annual consideration in advance at the Home Office in Fort Wayne, Ind., or to an authorized agent of the company, in exchange for the company's receipt, signed by the president and secretary and countersigned by the agent, but shall continue in force for the term or terms for which such annual consideration shall be paid; provided, however, that the liability of the company under such extension shall not be cumulative.

No consideration or agreement contained in this contract, or application for same, can be waived or altered in any manner by any person, other than the president or secretary, in writing endorsed hereon.

In Witness Whereof, The Physicians Defense Company has caused this contract to be signed by its president and secretary and its official seal attached hereto in Fort Wayne, Indiana, this _____ day of _____ 190__

FORM I

Miles F. Porter
President.

C. H. Merritt
Secretary.

Medico-Legal Bulletin.

THE DUTY OF THE MEDICAL EXPERT TO THE INDIVIDUAL AND TO THE STATE.

R. B. H. Gradwohl, M. D., St. Louis.

Instructor in Pathological Anatomy in the Medical Department of St. Louis University; Physician to the Coroner of St. Louis.

The main flaw in our present system of medical expert testimony is its extremely partisan character. There are other flaws in the system. Some of these flaws and abuses were developed to a remarkable degree in a case in which I was recently retained as an expert I propose to recite the medical facts of this case and such other points connected with it as are necessary to appreciate fully the argument. I refer to what has been called the "Watson case" recently tried in New London, Missouri, before the Circuit Court of Ralls County. The facts follow: Dr. Taylor J. Watson, a married man of forty years, a native of Ralls County, settled in Pueblo, Colorado, several years ago and engaged in the practice of osteopathy. From all accounts he lived on terms of perfect happiness with his wife. Last July, he came back to New London, accompanied by his wife, to visit relatives, intending later to visit the Universal Exposition at St. Louis. One afternoon, while driving with his wife in his brother's buggy, Watson journeyed down the Organ Ferry Road to the iron bridge which crosses the Salt River, about one mile from New London. The bridge is thirty-five feet high and rests on piers set in the river near either bank. There is a wooden rail on the bridge, about four feet in height near the approaches to the bridge, increasing in height towards the center of the bridge. The evening in question was July 5, 1904; it was raining on that evening. About 8 P. M. the horse and buggy, with no occupants, was found near the south end of the bridge (Watson drove on the bridge from the northern approach). The dashboard and shaft of the buggy were broken. Investigation revealed the unconscious form of Watson on the bridge. Help was summoned; Dr. W. T. Waters made a thorough examination and made a diagnosis of concussion of the brain; the patient was taken to the town; search was made and the body of Mrs. Watson was later found in the river, under the bridge, floating on the surface of the water. She was pre-

pared for burial; no visible marks of violence on her body were made out. She was embalmed and buried. Her husband recovered consciousness after being unconscious for thirty hours. He explained the accident by stating that the horse became frightened at a piece of paper lying on the bridge, began lunging; memory of all events thereafter was completely lost. His version was accepted and nothing more was thought of the case, except the unforntuate manner in which Mrs. Watson lost her life.

When the accident insurance companies who had insured the life of Mrs. Watson to the extent of $18,000 in favor of her husband were apprised of this case, they began an investigation to satisfy themselves that this was truly an accident. Apparently they thought there were suspicious circumstances connected with the case. They conducted a system of espionage on the movements of Watson, who subsequently came to the Exposition at St. Louis. Fortified by the results of their "shadowing" of Watson, emboldened by the convictions of their adjuster-detective representatives that foul play had been committed; working the science of deduction "over-time," to use a slang expression, the insurance companies employed two medical men of St. Louis to perform an autopsy on the body of Mrs. Watson. The body was exhumed and the autopsy was performed in the court house at New London by the Saint Louis physicians, in the presence of a number of local physicians. Their findings as reported at the coroner's inquest were, briefly, that they saw no signs of violence on the body, except a small abrasion over the nose; they found the pupils equal and contracted to the size of the "head of a pin." Brain and its membranes were normal. They testified that they opened the larynx, trachea, bronchi and lungs and found no foreign material present, no water, no sand. They testified that the lungs were "full and crepitant." They found clotted blood in the heart. Liver, kidneys and spleen were normal. The stomach was half filled with fluid. They stated that there were no signs of violence or of drowning, or of disease, and consequently thought the subject had been poisoned. The particular poison used, in their opinion, was morphine. For chemical proof they tied off the stomach, cut off pieces of the liver and kidneys, took the heart and brain in toto, dumped all the viscera into an ordinary tin bucket and poured over them some alcohol purchased from the village drug store. A piece of paper was used as a cover for the bucket. They testified that the bucket and its contents were safely taken to St. Louis, locked up in a laboratory and afterwards delivered to a physician in East St. Louis for chemical analysis He was directed to look for morphine. This physician stated at the coroner's inquest that he obtained three distinctive color reactions of morphine. The verdict of the coroner's jury was to the effcect that Watson killed his wife with morphine, and after she was dead, put

her dead body in the river. Watson was held on an information issued by the prosecuting attorney of Ralls County for murder in the first degree.

Watson, now defendant charged with murder, employed Messrs. J. O. Allison, R. F. Roy, C. T. Hays and G. W. Whitecotton as counsel These gentlemen mapped out his defense along clean-cut, intelligent and honest lines. Their straightforward and manly methods in the conduct of the case stood out prominently against the pettyfogging and "grand- stand play" on the part of the State's attorneys and struck by the demeanor of the State's experts while testifying before the coroner's inquest, knowing the fact of their partisan employment by the insurance companies, and not by the coroner of Ralls County; satisfied from the comments of other physicians who had been present at the autopsy that it had been incompletely performed; appalled by the fact that the viscera for a most exacting and delicate series of chemical manipulations had been ruthlessly and ignorantly deposited in a common, unclean tin bucket for transportation to the laboratory, subject to contaminations of all kinds while in this repository; above all, feeling sure that their client was innocent, that his wife had been accidently drowned and not poisoned, these able men drew up their case. A second autopsy was performed in a most painstaking and careful manner, observing everything, omitting nothing, concealing nothing, belittling nothing, magnifying nothing and manufacturing nothing. Most remarkable facts were adduced at this second autopsy. The lungs were found "full and crepitant," as described by the State's experts. The testimony of the State's experts that they had freely incised the lungs, trachea, bronchi and larynx, seeking signs of drowning, met startling refutation at the second autopsy which disclosed the fact that the only incision made into the entire respiratory tract was a small incision which had cut off a piece of pulmonary tissue about three or four inches long from the lower part of the right lung, along the margins. The lungs had not been separated from their attachments; the bronchi had not been opened, the trachea had not been exposed; the larynx was untouched; in short, the second autopsy showed that the gentlemen testifying for the State had not spoken truthfully in regard to their autopsy findings. The evidences, the plain, honest evidences of sand or other foreign material, nay, even of water, in the trachea, bronchi and lungs, could not have been sought for, by virtue of this inadequate examination on the part of the first autopsy physicians. I later examined the debris found in the respiratory tract, in larynx, trachea and bronchi, and found sand and plant cells in abundance. The second autopsy showed that the esophagus had not been opened at the first autopsy. It also contained sand and plant cells. The second autopsy showed that one kidney was intact and but a very small piece of the liver was missing. Further exam-

ination was made to determine the cause of death. The middle ear cavity on one side showed eight drops of clear fluid present. This fluid was neutral in reaction, contained no albumen and no cellular constituents, and was consequently not an inflamitory product. These several findings convinced the physicians at the second autopsy that ample signs of drowning were present. Nevertheless, a chemical examination was deemed expedient. Accordingly, the viscera, liver, kidney, small intestine and lungs were placed in separate clean glass jars, sealed, and taken in the custody of the sheriff of Ralls County to the labortaory of Dr. Victor C. Vaughan, of Ann Arbor, Michigan, where they were d livered to him in person. A sample of the embalming fluid was taken for chemical analysis. No analysis of the embalming fluid had been made by the State's chemist. In due time Dr. Vaughan reported that no signs of morphine were present in these viscera.

The testimony of the State.s experts at the trial was very similar to what he said at the coroner's inquest, excepting that cross-examination brought out some very "interesting" statements. The physician who made the first autopsy on the part of the insurance companies, gave his opinion that the cause of death was morphine poisoning; this was based on the minutely contracted pupils, and the "absence of any other signs pointing to any other cause of detath." He denied the presence of any signs of drowning; he denied that "full and crepitant lungs" indicate drowning, although that is diametrically opposed to authoritative teaching. He claimed that blood clots in the heart indicate morphine poisoning. While admitting that water in the middle ear is a good sign of drowning, he acknowledged that he had not looked for it, because, he said, "what is the use of it when the temperature is so hot you can almost faint, that you go in and saw out the ear, when you have all the other signs but that?" Later on, in rebutting the defense testimony that water was found in the middle ear at the second autopsy he maintained a most novel and strictly preposterous proposition, i. e., that there is normally sixty drops of clear lymph in the middle ear cavity and this is what was found at the second autopsy. This is an anatomical piece of information that is peculiarly his own, as the usual conception of the middle ear cavity is that it is an air space, under normal conditions. This same State's expert maintained that in every case of drowning, water in determinable quantity is to be found in the lungs. Confronted with Ogston's statistics, that water in the lungs is found in but 48% of observed cases (and Ogston has handled thousands), this expert stated that "if he tells you he has handled thousands of cases, he must have been so busy it made him mentally off, and he would not be competent to write about it." This needs no comment. In general, he testified

under cross examination, that he considered medical literature of small moment compared to the results of his own experience.

The testimony of the physician who made the chemical analysis for the State can be dismissed with a few words. He stated that he had obtained "three color reactions for morphine at a preliminary test" of the stomach contents. Later "complete" examinations gave none of these reactions of morphine with the visera. They presumed that the presence of the embalming fluid (which he discoveded contained formaldehyde by its odor when extracting the tissues) probably prevented the appearance of the color reactions of morphine. Not a word in his direct examination as to whether he found the crystals of morphine; in his cross-examination, he admitted that the finding of the crystals is an essential point to absolutely swear to morphine poisoning, yet acknowledged that he had not sought, and consequently had not found these essential crystals. His evidence indicated that he was not sure in his own mind at the time while testifying that he had found morphine, although he had been sure at the coroner's inquest.

Dr. Victor C. Vaughan, of Ann Arbor, testified that he found no reactions for morphine in the tissues of Mrs. Watson. Testifying along expert lines, he stated that the color reactions are deceptive and unreliable; that many ptomains give color reaction resembling those of morphine; that, in short, the color reactions of morphine when present, do not necessarily mean that morphine is present; when absent, it means that morphine is not present. Dr. Vaughan stated that the only positive means of identifying morphine in these toxicological investigations was to find the crystals of morphine. Without finding the crystals, we cannot swear that morphine is present. Asked as to the presence of the formaldehyde embalming fluid, and its influence on the prevention of the appearance of the color reactions in animal tissue containing morphine, Dr. Vaughan stated that among experienced workers, there is no possibility of this interference, because it can be easily avoided by slowly evaporating off all the formaldehyde.

The testimony of Dr. J. T. White, who performed the second autopsy, developed the signs of drowning. My testimony corroborated Dr. White's.

Dr. W. T. Waters testified concerning Watson's condition. Dr. T. J. Downing testified likewise. They maintained that Watson had consussion of the brain. The State claimed he was shamming. There were additional experts on the question of concussion, Drs. Paul Y. Tupper and C. G. Chaddock, who answered hypothetical questions in regard to Watson's condition. They believed that he had concussion.

The jury promptly returned a verdict of acquittal and Watson is now a free man, after having languished six months in a prison cell

awaiting trial. The case was an illustration of how a private interest in this case the insurance companies, can use the machinery of the criminal law, not only to prosecute, but even to persecute. In this case, the dead woman's father was supposed to be the prosecuting witness, yet he was merely a blind behind which stood the detective agents of the insurance companies, pulling the wires which moved the State's attorney and the State's experts. The character of the State's expert testimony represented the acme of partisan testimony; they not only magnified the medical points favorable for the State and "forgot" the points favorable for the defense, but they actually hesitated not to drive home their statements with deliberate untruths. Medical expert testimony has suffered many a blow before the tribunal of justice, but I venture to say that no more disgraceful episode has ever occurred in court than the one I have recounted.

This brings me to the question of the proper duty of the medical expert. We all realize that the partisan character of his employment militates against him. He unconsciously begins to feel that he must develop only those points favorable to his client. He becomes the medical advocate and loses his character as a witness. There was once a time when medical expert testimony in the courts of our country possessed almost judicial weight. Alas, that time no longer exists. As Wharton in his work on "Evidence" truly says, "when expert testimony was first introduced, it was regarded with great respect. An expert was viewed as a representative of a science of which he was a professor, giving impartially its conclusions. Two conditions have combined to produce a material change in this relation. In the first place it has been discovered that no expert, no matter how learned and incorruptible, speaks for his science as a whole. Few specialties are so small as not to be torn by factions, and often the smaller the specialty, the bitterer and more inflaming and distorting are the animosities by which these factions are possessed—"Nihil tam absurdo," which being literally translated means that there is nothing so absurd that the philosophers won't say it. In the second place, the retaining of experts by a fee proportioned to the importance of their testimony is now as customary as is the retaining of lawyers. No court would take as testimony the sworn statement of the law given by counsel retained on a particular side, for the reason that the most high-minded men are so swayed by an employment of this kind as to lose the power of impartial judgment; and so intense is this conviction that in every civilized community the retention by a judge of presents from suitors visits him not only with disqualification, but with disgrace. Hence it is, apart from the partisan part of their opinions, their utterances have lost all judicial authority, and are entitled only to the weight which sound and consistent criticism will award to the testimony itself. In making this criticism, a large allow-

ance must be made for the bias necessarily belonging to men retained to advocate a cause, who speak not as to fact, but as to opinion and who are selected, on all moot questions, either from their prior advocacy of them, or from their readiness to adopt the opinion to be proved. In this sense we may adopt the strong language of Lord Kenyon, that "skilled experts come with such a bias on their minds to support the cause in which they are embarked that hardly any weight should be given to their presence." This opinion of expert testimony is held by most judicial authorities in this country.

We should ask in first order, why should this state of affairs have arisen, this disrepute of the medical witness in court, and demand why should it be allowed to continue? Witthaus says that the main reason for the bad repute of the medical expert is the "employment of blatant, ignorant persons, or even persons who do not hesitate to commit plain perjury." Certainly, the honest, competent medical man will give fair testimony to a certain extent, yet human nature is such that no matter how honest one's instincts are, there is often felt the intangible, indefinite yet positive influence of employment. One expert on a certain side knows nothing of the facts of his adversary and consequently cannot scientifically sift out the good from the bad. This might be remedied by a conference of experts before a case goes to trial. In some parts of England, experts refuse to testify unless there has been such a conference.

Another reason for the present disrepute of expert testimony is the fact that very often men are allowed to qualify in court along certain special lines in which they do not really possess expert qualifications. They may be honest in their primary instincts, but they are ignorant. They are perhaps pitted against men who are really experts; in their zeal and ignorance, they make misstatements and disagree with the other side. Their titles may appear much more high-sounding and elaborate than those of the opposite experts of merits. And it is a matter of common knowledge "that fools rush in where angels fear to tread;" the ignorant and misguided expert can always be couned on to make absolute and sweeping statements, while his better-posted and more conservative adversary will qualify his answers; thus, it frequently happens that the real expert is apparently overshadowed by another expert who is mentally his inferior.

Responding again to the original proposition by offering a remedy why should this state of affairs have arisen, we might add that in general a higher standard of medical education is required. The incompetent men, products of the diploma mills, are in abundance. They exist because the diploma mill and "wild-cat medical college" is allowed to exist. The irregular schools each year are feeling the noose tightening more securely around their necks. When asphyxiation of these pests will finally have been accomplished, then will we

have a natural death of their offspring, the incompetent physician and the incompetent witness. And I wish to emphasize here the point that legal medicine is not taught in our average American medical school. With but few exceptions, the course is limited to few lectures by some prominent member of the bar on "medical jurisprudence." Legal medicine is not medical jurisprudence. Legal medicine is a specialty of medicine. In some schools, legal medicine is taught by each specialist devoting a few hours to medical facts coming within his particular field, i. e., the obstetrican teaches his students the signs of abortion, the chemist teaches rudiments of toxicology, the pathologist teaches autopsies, etc. Yet, as Prof. Draper, of Harvard, says in his admirable Text-book on Legal Medicine, "such a scheme, while plausible, is impracticable. In the nature of the case, it is unfruitful. An instructor gives instruction first and with most zeal in matters which specially interest him. He does not readily turn aside to discuss topics which, however important they may be, are more or less remote from his immediate themes.

Morover, it is evident that there are some things, the knowledge of which is essential to a full comprehension of medical jurisprudence, but which are outside any of the ordinary departments of instruction, and should therefore have independent treatment. Such topics, for example, as medical evidence in court and the legal relations of physicians to their patients and the community, deserve special treatment." Another class believe that if one is well trained in medicine, if he knows his anatomy, his chemistry, his surgery and midwifery, if he is honest and tells the truth, he need not fear to meet any crisis in court.

Forensic medicine, it is declared, is not an independent part of medical science, but a pretender without valid right to recognition. It is asserted that it offers nothing new in medical knowledge of every educated and properly equipped practitioner. That this is an unreasonable position, it requires but a moment's reflection to show. The knowledge is the same in general and forensic medicine, but in the latter it has novel relations and applications out of the common course. "Medical questions," says a high authority, "assume a very different aspect and reflect very novel hues when viewed in the glare of the court of justice from what they do in the midlight of the sick room or the hospital ward." Germany has the best corps of medical experts in the world, and Germany has the best course on legal medicine in the world. I can quote from the Verzeichniss of the University of Berlin, in the winter semister of 1900–1901, when I was studying there, showing twelve different courses on legal medicine. Austria and France vie with Germany in the teaching of legal medicine. And we should have it taught in our schools without delay.

I have pointed out the flaws in our system. What is the remedy?

The answer is difficult, yet the query can be answered. Mr. Henry Wollman, of the Kansas City bar, in a paper read before the Medico-Legal Society of New York (Medico-Legal Journal, March, 1900) suggests the appointment of a committee of experts by the representative medical society of each district, this committee to serve say for six months of a year. When expert testimony is required in such a district, let the attorneys go to this committee for their experts. Let no member of the society consent to appear in court as an expert witness unless his fellow practitioners have appointed him a member of that committee. This plan appears practicable. Another plan is the appointment by the court or by the governor of each State of a Commission of Experts. Let these experts be nominated by their representative societies. Let them decide matters of expert testimony. Let their fees be paid by the court and the costs afterward assessed against the side which loses the suit. Let the whole proposition of the partisan employment of experts be abolished. It is that partisan spirit which militates against the giving of impartial testimony. It seems contrary to the spirit of the Anglo-Saxon law to hope for a system of expert testimony in vogue now in France, Austria and Germany, where the expert is selected by the government on account of special training and qualification. He examines into the medical features of a given case and submits his findings, which are absolutely judicial and admit of no argument. The Cruppi law in France regulated the appointment of experts for the defense in criminal causes. These experts, of course, are well qualified. The French law introduced by Brouardel in 1884 and adopted in 1900, demands a special course of nine months at the Paris University to become a medico-legal expert. The legal physician of Germany must go through a special course and pass the special "Physikats-Examen" before he is qualified to be appointed. Could we have in this country a special diploma in legal medicine as proposed by Wyatt Johnstone of Montreal, we could soon have a special class of men who would be eligible for positions like medical examiners or coroners' physicians. There is a demand for such men. The fact of them possessing a special diploma in legal medicine would well qualify them as experts. They would soon be recognized in court, and their statements would be quasi-judicial, even though other testimony could be introduced; in short, while not possessing officially the absolute dictum-like character of the German or French government expert, they would practically decide the technical medical aspect of a murder charge, relieving the jury of that most arduous, unpleasant and ofttimes impossible task of obtaining an appreciation of the medical points of a case, and yet withal, Article VI of the Amendments to the Constitution of the United States would be held sacred, which demands that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public

trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the causation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."—Medical Fortnightly.

CONSTITUTIONALITY OF COMPULSORY VACCINATION LAW.

The Supreme Court of the United States says that the case of Jacobson vs. Massachusetts, as it is now entitled, was one where an adult, who, for aught that appeared, was in perfect health and a fit subject of vaccination, yet while remaining in the community refused to obey the Massachusetts statute empowering compulsory vaccination and a regulation adopted in execution of its provisions for the protection of the public health and the public safety, confessedly endangered by the presence of a dangerous disease. The court, however, now decides only that the statute covered this case, and that nothing clearly appeared that would justify the court in holding it to be unconstitutional and inoperative in its application to the defendant (Jacobson).

The court passes without extended discussion the suggestion that the particular section of the statute of Massachusetts in question was in derogation of rights secured by the preamble of the Constitution of the United States, because, although the preamble indicates the general purpose for which the people ordained and established the constitution, it has never been regarded as the source of any substantive power. The court also passes without discussion the suggestion that such section of the statute was opposed to the spirit of the constitution.

According to settled principles, the police power of a state, the court says, must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety. It is equally true that the state may invest local bodies called into existence for purposes of local administration with authority in some appropriate way to safeguard the public health and the public safety. On the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members. Smallpox being prevalent and increasing at Cambridge, where the regulation in question was adopted, the court would usurp the functions of another branch of government if it adjudged, as matter of law, that the mode adopted under the sanction of the state, to protect the people at large was arbitrary, and not justified by the necessities of the case.

It was said, however, that the statute, as interpreted by the state

court, although making an exception in favor of children certified by a registered physician to be unfit subjects for vaccination, made no exception in case of adults in like condition. But this could not be deemed a denial of the equal protection of the laws to adults; for the statute was applicable equally to all in like condition, and there were obviously reasons why regulations might be appropriate for adults which could not be safely applied to persons of tender years.

Certain offers of proof were made which in the main seemed to have had no purpose except to state the general theory of those of the medical profession who attach little or no value to vaccination as a means of preventing the spread of smallpox, or who think that vaccination causes other diseases of the body. But the court says that what everybody knows the court must know, and therefore the state court judicially knew, as this court knows, that an opposite theory accords with the common belief, and is maintained by high medical authority. It must be assumed that, when the statute in question was passed, the legislature of Massachusetts was not unaware of these opposing theories, and was compelled, of necessity, to choose between them. It was not compelled to commit a matter involving the public health and safety to the final decision of a court or jury. It was no part of the function of a court or a jury to determine which one of two modes was likely to be the most effective for the protection of the public against disease. That was for the legislative department to determine in the light of all the information it had or could obtain. It could not properly abdicate its function to guard the public health and safety.

Whatever may be thought of the expediency of this statute, it cannot be affirmed to be, beyond question, in palpable conflict with the constitution. Nor, in view of the method employed to stamp out the disease of smallpox, can any one confidently assert that the means prescribed by the state to that end has no real or substantial relation to the protection of the public health and the public safety. Such an assertion would not be consistent with the experience of this and other countries whose authorities have dealt with the disease of smallpox. And the principle of vaccination as a means to prevent the spread of smallpox has been enforced in many states by statutes making the vaccination of children a condition of their right to enter or remain in public schools. Since, then, vaccination, as a means of protecting a community against smallpox, finds strong support in the experience of this and other countries, no court, much less a jury, is justified in disregarding the action of the legislature simply because in its or their opinion that particular method was—perhaps, or possibly—not the best either for children or adults.

The defendant offered, among other things, to prove that he refused to submit to vaccination for the reason that he had, "when

a child," been caused great and extreme suffering for a long period by a disease produced by vaccination, though he did not offer to prove that, by reason of his then condition, he was in fact not a fit subject of vaccination at the time he was informed of the requirement of the regulation adopted by the board of health. The court says that it was entirely consistent with his offer of proof that, after reaching full age, he had become, so far as medical skill could discover, and when informed of the regulation of the board of health was, a fit subject of vaccination, and that the vaccine matter to be used in his case was such as any medical practitioner of good standing would regard as proper to be used. The matured opinions of medical men everywhere, and the experience of mankind, as all must know, negative the suggestion that it is not possible in any case to determine whether vaccination is safe.

Was the defendant exempted from the operation of the statute simply because of his dread of the same evil results experienced by him when a child, and which he had observed in the cases of his son and other children? Could he reasonably claim such an exemption because "quite often," or "occasionally," injury had resulted from vaccination, or because it was impossible, in the opinion of some, by any practical test, to determine with absolute certainty whether a particular person could be safely vaccinated? It seems to the court that an affirmative answer to these questions would practically strip the legislative department of its function to care for the public health and the public safety when endangered by epidemics of disease. Such an answer would mean that compulsory vaccination could not, in any conceivable case, be legally enforced in a community, even at the command of the legislature, however widespread the epidemic of smallpox, and however deep and universal was the belief of the community and of its medical advisers that a system of general vaccination was vital to the safety of all.

This court is not prepared to hold that a minority, residing or remaining in any city or town where smallpox is prevalent, and enjoying the general protection afforded by an organized local government may thus defy the will of its constituted authorities, acting in good faith for all, under the legislative sanction of the state. If such be the privilege of a minority, then a like privilege would belong to each individual of the community, and the spectacle would be presented of the welfare and safety of an entire population being subordinated to the notions of a single individual who chooses to remain a part of that population. The court is unwilling to hold it to be an element in the liberty secured by the Constitution of the United States that one person, or a minority of persons, residing in any community and enjoying the benefits of the local government, should have the power

thus to dominate the majority when supported in their action by the authority of the state.

In order, however, to prevent misapprehension as to its views, the court thinks it appropriate to observe that the police power of a state, whether exercised directly by the legislature, or by a local body acting under its authority, may be exerted in such circumstances, or by regulations so arbitrary and oppressive in particular cases, as to justify the interference of the courts to prevent wrong and oppression. Extreme cases can be readily suggested. Ordinarily such cases are not safe guides in the administration of the law. It is easy, for instance, to suppose the case of an adult who is embraced by the mere words of the act, but yet to subject whom to vaccination in a particular condition of his health or body would be cruel and inhuman in the last degree. The court is not to be understood as holding that the statute was intended to be applied to such a case, or, if it was so intended, that the judiciary would not be competent to interfere and protect the health and life of the individual concerned. But, until otherwise informed by the highest court of Massachusetts, this court is not inclined to hold that the Massachusetts statute establishes the absolute rule that an adult must be vaccinated if it be apparent or can be shown with reasonable certainty that he is not at the time a fit subject of vaccination, or that vaccination, by reason of his then condition would seriously impair his health, or probably cause his death.—J. A. M. A.

"Did I discover this? How can it be?
This limit of our lives, this 'Forty Years,'
Or did I say that after forty beers
Our usefulness is over? and, O Gee!
I'm over forty—yet the discovery
Is real, and, as I said, till 'sixty' years
We can make money. But alas! my fears!
They're coming with the Chloroform for me!"

L.

—American Medical Journal.

A bill introduced by Mr. Burnett has passed the legislature of Illinois prohibiting attorneys from soliciting personal or other damage cases. This measure was endorsed by the State Bar Association, and is directed against shyster lawyers, who make a business of drumming up this character of practice against members of the medical profession.

State Medicine.

Under this head will be published articles relative to the application of medical knowledge to the public welfare. It includes forensic medicine, public hygiene, medical ethics, medical education and military and naval medicine.

Communications, articles and reports from members of state boards of health and boards of registration and examination are requested.

HEALERS OBLIGED TO REPORT CONTAGIOUS DISEASES.

The Minneapolis city council has recently passed an ordinance requiring all kinds of healers, osteopaths, faith-curists, chiropractics, and Christian scientists, to report all contagious or preventable diseases. The list includes tuberculosis, typhoid, pneumonia, and the various exanthematous diseases. The ordinance implies that all those who treat disease must be able to diagnose properly the conditions they come in contact with. It also implies that healers must be qualified physicians or, if not able to recognize or diagnosticate contagious diseases, or in any way are reckless or careless and allow contagion to occur they must suffer a penalty for the violation of laws which guard the public health. It is presumed that local boards of health may legally require the observance of the ordinance.

So far it has been impossible to secure the conviction of the irregular or itinerant practitioner, for the reason that the accused disclaims any responsibility, excusing themselves on the ground that they were not engaged in the practice of medicine.

The regularly licensed practitioner who seeks to evade the laws of quarantine for the purpose of relieving his favored patient from the restrictions of a placard, is arrested and fined. The public are pleased to know the doctor must live up to the letter of the law, and are correspondingly displeased when the so-called healers are persecuted—from their standpoint.

Unquestionably the spread of many contagious diseases is due to ignorance of the healer who does not distinguish between "error of thought" and the virulence of germs. If the ordinance is sound, (there is no question but that it has been carefully considered), the effect of it will soon be tested.

If Minneapolis is able to maintain and enforce its ordinance, it will be copied elsewhere.

The weapon against irregular medicine is powerful, and will do more good than essays or criticism. The ordinance follows:

Every person who shall treat, attend, or visit, for the purpose of treating with or without physical agencies any other person who is sick or affected with any contagious or infectious disease, such as asiatic cholera, whooping cough, yellow fever, smallpox, scarlet fever, measles, tuberculosis, diphth ria, membraneous croup, typhus or typhoid fever, within said city, there being no regularly licensed physician in attendance shall, within 24 hours after the first treatment, attendance or visit, as aforesaid, report in writing to the Department of Health of said city the existence of such disease, the date of its appearance, and the name and address of the person affected therewith, and every person who shall so treat, attend or visit as aforesaid any other person who is sick with any such disease, shall be presumed to have and possess such knowledge of the characteristic symptoms of said contagious or infectious diseases as is commonly possessed by physicians regularly licensed to the practice of medicine under the laws of the state of Minnesota.—Northwestern Lancet.

MISSED NOTHING BUT HIS WATCH.

An old darkey was taken ill, says the New York Times, and called in a physician of his own race. After a time, as there were no signs of improvement, he asked for a white doctor.

Soon after arriving, Dr. ——— felt the old man's pulse, and then examined his tongue. "Did your other doctor take your temperature?" he asked. "I don't know, boss," replied the sick negro, "I hain't missed anything but my watch as yit."

REMOVING A MEDICAL BOYCOTT.

It is said the fact that a physician in the upper part of the county sent a patient to the Allentown, Pa., Hospital suffering from a disease from which he died the following day, has awakened the authorities of that institution to a condition of affairs which they don't know how to combat. Among the mass of foreginers at work in the cement mills and quarries in Lehigh and Northampton counties there is a superstition that it is unlucky to employ a physician who has failed to cure any of their number, and such a physician is instantly boycotted. To offset this superstition it is the habit of certain physicians to rush their patients immediately to the hospital as soon as they realize that they cannot recover. This process greatly increases the mortality list of the hospital.—American Medicine.

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THE MEDICO-LEGAL BULLETIN is issued on the first of each month, in the interests of the medical profession from a Medico-Legal standpoint, and will spare no endeavor to furnish valuable news and information relative to legislative enactments and judicial decisions affecting the profession. Communications on these subjects are solicited from all interested. Reprints of contributed original articles will be furnished, without charge, to authors making request.

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POSSESSION OF PHYSICIANS INSURANCE POLICY MADE KNOWN TO THE JURY.

The Physicians Defense Company has always contended that the possession of a Physicians Liability Policy, as issued by the Casualty Insurance Companies, agreeing to indemnify the holder in the event a judgment is rendered against him for damages in civil malpractice, could be made known to the jury, and that such knowledge would have a tendency toward an adverse verdict.

Under such circumstances, the jury loses sight of the physicains' professional reputation, which is the main issue at stake. They see displayed before them the stiffened joint, crooked or shortened limb, or incapacitating injury, or the large and poor family in their "rusty black," and, desiring to relieve the distress of their neighbors and fellow citizen, and knowing the insurance company under its policy will be required to indemnify the physician, they render a verdict against the latter.

It has been the contention of the local agents and attorneys of the Casualty Companies that the possession of the Insurance Policy by the Physician, could not be made known to the jury. They have held that they could object to the presentation of such evidence and

thus exclude it. In innumerable instances however, the information has been given the jury with the result that an excessive veridct was rendered against the physician.

Our contention relative to this matter has been fully sustained in a recent decision of the Supreme Court of Wisconsin. In the case of Faber vs. Coal Company, 102 N. W. (Wis.) 1049, the attorney for the plaintiff asked the jurors as they were being selected, if they were stockholders in a certain Insurance Company. To such question, the defendant's lawyer objected, on the ground that it was an attempt to introduce improper matter before the jury. Thereupon, the plaintiff's attorney stated to the court that the question was relevant and material because "he understood that a certain Insurance Company had a pecuniary interest in the outcome of the suit," and that if the juror was a stockholder in the company it would make him an incompetent juror. Thereupon, the court allowed the attorney for the plaintiff to ask the question of the juror. On appeal the Supreme Court held that it was proper to permit the attorney to ask such question of the juror, and that it would not constitute ground for a new trial.

The same procedure could be applied in the defense of a malpractice suit brought against a physician under an insurance policy In order to show the physician's possession of the indemnifying policy, the attorney for the prosecution could ask the jurors as they were being selected, if they were stockholders in the insurance company. Of course, he would know that they were not, yet in this manner could he bring to their attention the fact that the insurance company could be held in damages for the acts of the physicians to the amount as provided in the company's policy.

The result of such a situation under the Physicians Defense Company's contract, does not apply to the physician, for if the attorney for the prosecution attempts to introduce to the jury the fact of our connection with the physicians defense, our attorneys can go into the contract and show that it does not indemnify the physician, and that if a verdict is rendered against him, the prosecution will have to look to the physician alone for damages. We can further show that the enormous number of unfounded malpractice suits has compelled the medical profession to seek protection with us against unjust claims, and this company is organized purely to defend medical practitioners against such blackmailers.

Judicial Decisions.

Under this heading will be presented each month information relative to judicial decisions affecting the medical profession.

DRUGLESS HEALING IS PRACTICE OF MEDICINE.

The Supreme Court of New Mexico says that in the case of Territory vs. Newman, where the defendant was indicted for practicing or offering to practice, medicine without having obtained a license, the jury were instructed as follows: "The practice of 'medicine' . . . means (1) to open an office for the practice of medicine; or (2) to announce to the public or to any individual, in any way, a desire or willingness or readiness to treat the sick or afflicted, or investigate or diganose, or offer to investigate or diagnose, any physical or medical ailments or disease of any person; or (3) to suggest, recomment, prescribe, or direct for the use of any person any drug, medicine, appliance, or other agency, whether material or not material, for the use, relief, or palliation of any ailment or disease of the mind or body, or the cure or relief of any wound, fracture, or bodily injury or deformity, after having received or with the intent to receive therefor, either directly or indirectly, any bonus, gift, or compensation." This instruction, which was objected to, seems to the court to have been favorable to the defendant, rather than otherwise, since it greatly restricted the number of acts which the jury might otherwise have found the defendant committed in violation of the statute. It says that the subdivision complained of was a proper and appropriate one, under the circumstances.

Then the defendant objected that by the statute a new, unusual, and false meaning was given to the phrase "practicing medicine;" that he never engaged or offered to engage in the practice of medicine; that, on the contrary, the evidence showed him to be a practitioner of a system of drugless healing and that the Legislature could not so extend the meaning of said words "practice of medicine" as to cover and include methods of healing diametrically opposed to the practice of medicine as theretofore commonly understood and defined. The court answers it would perhaps have been possible for the legislature to choose a better phrase under which to group healing methods of all kinds, although the use of the expression "practicing medicine" to mean the art of healing is by no means new, but rather a return to

the original meaning of the word "medical." But whatever may be thought of the terms in which the prohibition of the statute is expressed, there can be no doubt of their meaning; and the defendant was clearly forbidden to do that which the evidence showed, and he did not deny, that he did, without a license from the board of health as provided for by the statute. That it was not claimed he had, and, if the statute was valid, he was liable to the penalty imposed by it.

Again, the court says that it should be noted that the statute does not forbid the use of methods which the defendant said he followed for the cure of disease, or any other methods whatever, but only requires that those who prescribe or make use of them in the practice of medicine, as defined by the statute, shall have qualified themselves for such practice, and received a license, as evidence of such qualification. That the practice of the art of healing, in whatever form and in whatever name it may be followed, is subject to regulation by legislative enactment, under the police power of the state, is so well established that it is no longer open to question. If there were no such rights and regulations, it would be necessary to create them, for the protection of the public against those who take advantage of the widespread ignorance which exists in relation to the human organism to impose their useless and often harmful nostrums and treatments on those who are, or may be led to believe they are, in some way diseased. It is equally certain that the right to regulate should be exercised only in the public interest, and not to create monopolies, or otherwise to violate those fundamental rights which are secured to all citizens.

That certain acts should be made punishable if done for gain, which are not prohibited if done without bad motive, seems to the court to be a matter properly within the discretion of the legislature. It says that it may reasonably have been assumed that the public needed no protection against charitable or friendly ministrations, in which the elements of good fatih and sincerety of belief in the remedies prescribed would naturally be present, and in which greed could have no place. It is true that the statute commits the licensing power to a board composed of physicians who shall be graduates of some medical school in good standing, but the inclusion under the term "practice of medicine" of what it is made to cover by the statute might reasonably be construed to extend the meaning of the words used to describe the members of the board in like manner. Whether that view be taken or not, it is certain that the board provided for could be held by the courts to the exercise of its powers in a reasonable and just manner, and would have no right to refuse to issue a license to any one merely because of his being a practictioner of some school of healing different from that to which the members of the board belong. The defendant claimed, also, that the educational qualifications imposed

by the statue were not adapted to or required in the simple method of healing which he followed, and that they amounted to a prohibition of his constitutional right to follow his calling. But the court says that the requirements are the same for all who propose to engage in the practice of medicine, as defined by the statute in question, and therefore not open to the objection that any particular class is unduly favored.—J. A. M. A.

HYPNOTISM AND QUALIFICATION OF EXPERT WITNESSES.

The Supreme Court of Iowa says that the connection of hypnotism with the case of State vs. Donovan, a prosecution for seduction, was merely a matter of evidence. It says that, according to the story of the prosecutrix, the defendant claimed to control her movements by what he termed "suggestions," and exercised hypnotic influence over her at different times. To prove his power in this direction and its nature, the trial court received, over objection, evidence of instances where he had operated on other subjects, and of the control exerted over them. This court knows of no other way by which such proof could have been made. The evidence was admissible. Again, the Supreme Court says that the jury were instructed to take into consideration, in connection with other evidence, the "testimony relating to the exercise of attempted exercise of hypnotic influence." This was proper, for, regardless of whether such influence was in fact exercised, the evidence tended to show that he was pretending to exert it on her, and thereby having some effect on her mind. Whether exercised by the accused or only pretended, was not very important, if in either event it was resorted to as a scheme or artifice to procure the debauch of the prosecutrix. Two physicians were called, and, as tending to establish their qualification to testify as experts on the use of hypnotism as an anesthetic, stated—the one, that he was the superintendent of an insane hospital; had not made an extensive study of the subject, but knew, to a certain extent, what modern authorities said on the subject; had never practiced hypnotism, but had witnessed experiments by others; and the other, that he had made some study of the subject; had practiced it somewhat, and knew a few of the works recognized as standard authorities, but had never attended a school teaching hypnotism; there being but one in existence, located in France. The Supreme Court holds that there was no error in overruling an objection to their competency. It says that the inquiry related to matters connected with the profession of the witnesses, and, in order to testify concerning the same, they were not required to have derived their knowledge from actual experience or observation. Experts, as every one knows, obtain much of what they know from books, and may express opinions based thereon as well as on experience. Whether a

person may testify does not depend on any well-defined standard by which his qualification to speak shall be measured. He should always possess such a degree of knowledge or skill as to enable him to speak intelligently on the subject, and, beyond this, in passing on the preliminary proof, much must of necessity be left to the discretion of the trial judge. These witnesses had studied the subject in different authorities, and were able to say from their investigation that surgical operations may be performed on patients in the hypnotic state; having been previously informed of what would be done, and that no pain would result.—J. A. M. A.

CARE, INVALID ENTITLED TO—ITEMIZING ACCOUNT.

The Supreme Court of California says, in re Hayden's Estate, where the ward was an old lady, paralyzed, helpless and needing the care of a nurse at all times, and who had plenty of property to support her, that in such case it was the duty of the guardian and of the court to see that she had all the necessary comforts that could be supplied to her in her last days, even if it had taken the principal for such purpose. The court should not have allowed her to be deprived of suitable food, nursing, and medical attendance in order that the estate left might be larger, or that some distant relative might be benefited. If she was not cared for by another party who had agreed to care for her, and the guardian gave her such care, his account would not be disallowed because such other party had made an agreement to care for her.

As to the contention that some of the charges contained in the guardian's account were not properly itemized, the court says that the only portion of the account called to its attention in the brief was for medical attendance. The items were as follows: "April 25, Dr. Harry, 20 visits, at $2.50, $50.00. September 4: Dr. Arthur, medical services, $70.00." The above charges were sufficiently itemized within the meaning of the statute. They showed the date of payment, the amount, the person to whom paid, and the nature of the services. It is not necessary that a bill of a physician should contain each item that goes to make up the charge. If the amount of the claim is disputed, or if it is denied that the services were rendered, the court on the hearing may go into the particulars.—J. A. M. A.

MEDICAL EXAMINATION NOT INDISPENSABLE IN RAPE CASE.

The Supreme Court of Oklahoma holds, in Harmon vs. Territory, that a medical examination of the prosecutrix is not indispensable to warrant a conviction for the crime of rape.

DIFFICULT OPERATION AND LOSS OF CHILDBEARING POWER.

The Supreme Court of Appeals of West Virginia holds, in Normile vs. Wheeling Traction Co., that, in an action for personal injuries where, as a result of such injuries, a surgical operation is necessary to be performed, evidence which shows or tends to show that such operation is attended with great difficulty and dangers, and that comparatively few physicians perform such operation, is admissible. It says that these facts would increase the expense of securing a physician to do the work, and, this being an element of damages which the plaintiff would be entitled to recover, it would alone make the evidence admissible. Then, again, to show that it was such an operation that but very few physicians would perform would go to show the difficulties attending its performance, and the gravity of it, which would also make the evidence admissible.

Furthermore, the court holds that it is not error to instruct the jury that the loss of childbearing power is an element of damage to be considered by them in an action for personal injuries sustained through the negligence of the defendant, when such loss is the reasonable and probable result of such negligent act. It says that the loss of the power of childbearing is certainly an element of damage to be taken into consideration by the jury, as much so as an injury to any other part of the human body, and the question as to whether or not the injury is the reasonable and probable consequence of the negligent act is a question of fact for the jury. So here it was for them to say whether or not the operation of laparotomy was made necessary by reason of the accident, and, if so, was the loss of childbearing the reasonable and probable consequence of such negligent act.

FRIENDLY VISIT DOES NOT ESTABLISH PROFESSIONAL RELATION—NO MORAL INSANITY.

The Supreme Court of Louisiana holds, in the case of State vs. Lyons, that it does not follow, because a physician visits a person with whom he is acquainted, and who, being charged with murder, is lying in a hospital, under treatment for a wound, that such visit is paid in a professional capacity, or that the relation of physician and patient is thereby established between them. It also holds that the doctrine of moral insanity, which consists of irresistible impulse coexistent with sanity, has no support either in psychology or law.—J. A. M. A.

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JULY 1905

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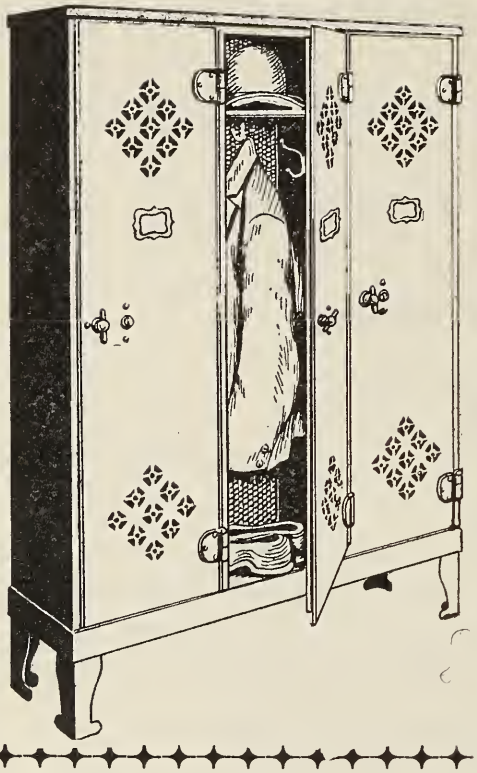

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For a Defense Contract for *Medical and Surgical and Dental Services, and I understand and agree that said Contract shall be based upon the following statement of facts and agreements; and that the Company shall not be bound by statements made by any agent or broker not written or printed herein.

My full name is.....Office No.....St.

City of.....County of.....State of.....

If connected with a firm, the style is.....

I graduated from the.....in the year.....

I practice under the.....School of Medicine; and have been duly Registered and Licensed to practice

in this county, under the Laws of this State. Certificate No.....from the.....

I agree that this contract shall not cover suits for damages in which services were rendered while under the influence of liquors or drugs.

I agree to notify the Company at once by telegraph or telephone when demand is made, or suit commenced for damages, and will not make nor contract any expense without the written authorization of the Company, and will contribute my own time and assistance in defense of the case without charge to the Company.

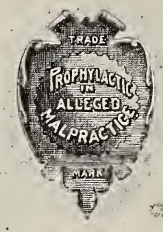
I warrant each and all of the statements made herein to be true and complete. I also warrant that this application has been made and written by myself or duly authorized agent and that I understand its provisions

Date.....190... (Applicant's Signature).....

* Cross out professions not practiced.

Received H. O. *Issued*

CAPITAL STOCK $100,000 NUMBER INCORPORATED UNDER THE LAWS OF INDIANA



The Physicians Defense Company

FORT WAYNE INDIANA.

Long Distance Telephones: BELL, 45. HOME, 1338

In Consideration *of the written and printed application, which is hereby made o part of this contract, and the sum of Fifteen Dollars, receipt of which is hereby acknowledged, being the consideration for one year's defense, and the further payment of Fifteen Dollars annually in advance on the ___ day of ___ of each year during the life of this contract,*

The Physicians Defense Company
(HEREINAFTER KNOWN AS COMPANY)

hereby agrees to defend the legally qualified Physician,

___ *of the City of* ___, *County of* ___, *State of* ___ *against all civil suits for damages for malpractice, based on professional services rendered by himself or his agent during the term of this contract, at its own expense, not exceeding FIVE THOUSAND DOLLARS in defense of any one suit, nor exceeding in the aggregate TEN THOUSAND DOLLARS in defense of suits based on services rendered by the holder hereof, within one year from the date of this contract, or within any one year for which this contract shall be renewed, all in the manner and upon the conditions herein below stated, to-wit:*

Immediate notice by telegram, must be given the company at the Home Office at Fort Wayne, Ind., of any suit brought or demand made; and the holder hereof shall immediately forward the summons, or other process served, and the complaint or petition filed, together with a full and complete history of the case and services rendered.

Upon receipt of notice from the holder hereof that a suit has been commenced against him for damages for civil malpractice, the company will employ a local attorney in whose selection the holder hereof shall have a voice, who, together with the company's attorney, will defend the case without expense to the holder hereof.

Such defense will be maintained until final judgment shall have been obtained in favor of the holder hereof, or until all remedies by appeal, writ of error or other legal proceedings shall have been exhausted, or until the sum of Five Thousand Dollars shall have been expended in said defense; provided said company shall not be under obligation to expend more than Ten Thousand Dollars in the aggregate in the defense of suits based on services rendered, by the holder hereof, during the original one year term or any renewed one year term of this contract.

Said company does not obligate itself to pay or to assume or to secure the payment of any judgment rendered against the holder hereof, in any suit defended by it.

The company shall not compromise any suit or claim for malpractice against the holder hereof. Nor shall the holder hereof, after the company has entered upon the defense of any such suit in behalf of the contract holder, compromise the same without the consent of the company in writing first thereto had, and by reimbursement of the company its expenses theretofore incurred.

No suit or claim will be defended by this company, under this contract, in which the cause of action arose previous to the date of this contract.

This contract does not cover criminal prosecutions nor suits for assault, criminal abortion, foeticide, homicide or other criminal act, or actions arising by way of counter-claim or recoupment.

The company may cancel at any time the unexpired portion of this contract upon written notice mailed to the holder hereof, and the unearned portion of the consideration therefor shall be returned to the holder hereof.

This contract does not take effect until the consideration therefor shall have actually been paid to the company or its authorized agent; but if the holder shall have paid such consideration and shall have received from the company or its duly authorized agent a memorandum certifying such payment and that the contract is to be subsequently delivered, then this contract shall be dated as of the date of such payment and shall be in force and effect from that date.

This contract shall not lapse at the end of the time as stated above if the holder hereof shall pay the annual consideration in advance at the Home Office in Fort Wayne, Ind., or to an authorized agent of the company, in exchange for the company's receipt, signed by the president and secretary and countersigned by the agent, but shall continue in force for the term or terms for which such annual consideration shall be paid; provided, however, that the liability of the company under such extension shall not be cumulative.

No consideration or agreement contained in this contract, or application for same, can be waived or altered in any manner by any person, other than the president or secretary, in writing endorsed hereon.

In Witness Whereof, The Physicians Defense Company has caused this contract to be signed by its president and secretary and its official seal attached hereto in Fort Wayne, Indiana, this ___ day of ___ 190__.

FORM 1

Miles F. Porter
President.

E. A. Merritt
Secretary.

Medico-Legal Bulletin.

MEDICAL EXPERT EVIDENCE IS A RADICAL CHANGE IN THE PRESENT SYSTEM ADVISABLE.

By John Morris, Jr., of the Indiana Bar.

It is a well established principle, both in England land in this country, that the opinions of persons specially skilled in medicine and surgery are admissible in evidence, upon a question pertaining to their art or science involved in a judicial proceeding. The principle is founded upon necessity, for the studies, pursuits and experience of judges and juries are not usually such as to make them familiar with this particular department of knowledge. "A learned and practiced chemist can tell," says Mr. William L. Foster in an article on Expert Testimony in the Harvard Law Review for November, 1897, "(but I cannot, nor can any juror) whether the stains upon a garment are of blood or rust; and if of blood, whether it be the blood of man or beast; and yet upon the true answer to such an inquiry a human life may depend. So the question whether a death has been caused by poison can ordinarily be determined only by an experienced toxicologist. Indeed, the field of judicial investigation requiring the assistance of experts is illimitable. The anatomy of the human frame, the diseases of the human body, the derangements of the functions of the human brain,—in some form or other these are matters of daily investigation in the courts, and concerning all these things the average juror, lawyer, and judge is so profoundly ignorant that the search for truth, unaided by the knowledge and judgment of scientific and medical experts, would be utterly hopeless."

The practice of receiving such evidence was a feature of the Roman law, and has prevailed in many of the continental systems founded thereon. In England, at a very early period—in fact, as soon as the right of jurors to determine controversies from their own knowledge became obsolete and the practice of producing evidence in open court began to prevail—opinion evidence, especially of medical witnesses began to be received.

From this early period, the employment of opinion evidence in the judicial system of England, as well as in the judicial systems of this country that are of English origin, has continued to the present

day, increasing with the progress of science and the advancement of civilization, but without practical change in the method by which it is received in our courts. It has been well and truthfully said that "the scientific expert is a product of an advanced and rapidly advancing civilization; that he has acquired an immensely increased importance, and a much wider field, and a far greater frequency of employment by the recent marvelous advances in the application of science—applications which have increased the sphere of things to be litigated about."

The value and necessity of medical expert testimony have been recognized, not only by the fact that, in all proper cases, it is universally received by our courts in all jurisdictions, but by frequent expressions of courts in their decisions.

In a case before the Supreme Court of North Carolina, the court says that "the opinion of a well instructed and experienced medical man, in a matter within the scope of his profession and based on personal observation and knowledge, is, and ought to be, carefully considered and weighed by the jury in rendering their verdict."

"The opinions of medical men," say the Supreme Court of Texas, "are received with great respect and consideration, and properly so."

"It is well settled," say the Supreme Court of Pennsylvania, "that the knowledge and experience of medical experts is of great value in questions of insanity."

The Supreme Court of Mississippi, in a case before it, uses the following language: "Prominent among the testimony necessarily made use of at this stage of the investigation, is that of medical and scientific persons—surgeons, physicians and chemists—by whom the body or its remains have been inspected and examined, either at the time of the discovery or shortly after. The testimony of these witnesses, as to the appearance observed on such examinations, is always of the greatest value, and their opinions as to the cause of such appearances are entitled to much consideration."

These quotations are sufficient to illustrate the views expressed by many of our highest courts in their judicial decisions.

Notwithstanding the fact, however, that the value, importance, and necessity of medical expert testimony has been thus recognized—I might say established—not only by the expressions of these eminent and distinguished courts, but by the fact that the employment of it in our judicial system began at a remote period and has continued and constantly increased until the present time, this class of testimony, and especially the method of admitting it in the trial of cases, as well as the expert himself, have been subjects of such frequent and severe criticism and of such sweeping condemnation on the part of certain judges and writers on jurisprudence, as to create in the public mind a distrust of all medical testimony and to impair, if not destroy, its

legitimate value and usefulness in admittedly proper cases. A few quotations will be sufficient to illustrate the nature of these criticisms. You are probably familiar with the remark attributed to a certain lawyer, in his closing address to the jury, to the effect that "there are three kinds of liars—the common liar, the d——d liar, and the scientific expert."

Mr. Justice Davis, while on the Supreme Court of the United States in one of his written opinions,, used the following language: "I do not say this to discredit the verdict of juries. I think they are far more reliable than experts on the subject of insanity. If there is any kind of testimony that is not only of no value, but even worse than that, it is, in my judgment, that of medical experts. They may be able to state the diagnosis of the disease more learnedly, but upon the question, whether it had, at a given time, reached such a stage that the subject of it was capable of making a contract, or irresponsible for his acts, the opinion of his neighbors, if men of good common sense, would be worth more than that of all the experts in the country."

A leading authority on the law of evidence in this country, thus speaks of medical expert testimony: "Unfortunately for the regrets here expressed, in regard to the absence of medical experts, who could place all doubts and uncertainties upon this perplexing subject in such a light as to remove all difficulty, experience has shown, both here and in England, that they differ quite as widely in their influences and opinions as do the other witnesses. That has become so uniform a result with medical experts, of late, that they are beginning to be regarded in much the same light as hired advocates, and their testimony as nothing more than a studied argument in favor of the side for which they have been called. So uniformly has this proven true, in our limited experience, that it would excite scarcely less surprise to find an EXPERT, called by one side, testifying in any particular in favor of the other side, than to find the counsel upon either side arguing against their clients, and in favor of their antagonists."

Mr. Justice Miller, when on the Federal Circuit Bench, after stating that he, himself, had no confidence in the impression produced by any number of EX PARTE affidavits of experts, said: "My own experience, both in the local courts and in the Supreme Court of the United States, is, that whenever the matter in contest involves an immense sum of value, and when the question turns mainly upon opinions of experts, there is no difficulty in introducing any amount of them on either side."

"It must be painfully evident to every practitioner," say the Supreme Court of California, "that these witnesses are generally but adroit advocates of the theory upon which the party calling them

relies, rather than impartial experts, upon whose superior judgment and learning the jury can safely rely."

In an article in the AMERICAN LAW REVIEW for November, 1898, Mr. G. A. Endlich says that "it is patent to every one who chooses to inform himself, that expert testimony, as now received in our courts, is looked upon by the public as an unmitigated farce and a nuisance."

Another writer declares that the "prevalent method" is "universally condemned by judges, law-writers, experts themselves, and the jury."

In a paper read before the New York State Medical Association, in October, 1899, Mr. Willard Bartlett, Justice of the Appellate Division of the Supreme Court of New York, says that "The partisan character of expert testimony becomes unmistakable, when the medical man participates in a trial not only as a witness giving opinion evidence, but also as an adviser to counsel trying the case;" and that, "The discredit into which expert evidence has fallen is mainly due to the prevailing impression that experts almost invariably testify in the interest of the party by whom they are called and paid."

It would be deplorable indeed, as Judge Foster has said, if such criticisms were justified by the facts. He gave it as his belief, however, "resulting," he said, "from the observation and experience of many years, that there are few instances in which a scientific witness permits himself to testify or to be engaged on a side contrary to his convictions derived from a careful examination of the case." This is my own belief, and the belief, in my opinion, of the great majority of lawyers who do the practical work in the trial of cases.

Among the evils and abuses said to result from the practice of admitting expert evidence are: The lack of satisfactory standards of expertness with the result of inviting the testimony of quacks and charlatans; the partisan and conflicting, and, hence, unreliable character of the evidence given by expert witnesses, which is claimed to be occasioned, to a great extent, by the fact that they are employed and paid by one party or the other to the action; the confusing effect on the jury of the hypothetical method of questioning such witnesses, and the prolongation of trials and the consequent waste of time and increase of expense on account of the number of such witnesses called.

No one, so far as I am aware, has ever ventured to propose, on account of these evils, that we should do away with expert testimony entirely and abolish the practice of receiving it in the trial of cases. Notwithstanding the character of the language used in the criticism of expert testimony, it seems to be conceded by most of the critics that all the evils pointed out have resulted, not from expert testimony in and of itself, but from the system or method which has always prevailed of producing and eliciting such testimony in the trial of cases.

In the last year or two the interest in the subject of procuring

some reform in the method of receiving medical, as well as other kinds of expert testimony, has noticably decreased, but, for a period of ten or fifteen, or, perhaps, twenty years prior to that time, there seems to have been a constantly growing interest in the subject, due, in my opinion, partly to the increase in the number of law magazines and text-books published, and more to the fact that associations of lawyers began to be regularly established in nearly every state and to hold annual meetings which were more largely attended each year. The subject of expert testimony naturally received its proper share of attention from the class of lawyers and professors of law whose time and tastes qualified them for reading papers at meetings of these associations, and influencing, if not controlling, their actions. The result was that the subject was discussed and discussed, not only by these men, but by writers for law books and magazines, and the discussion, on the part of most writers, assumed such a tone of fault-finding and disparagement of the prevailing system that it became, in my opipion, largely responsible for the odium which, even today, attaches, not only to expert testimony, but to the expert witness, and especially the medical expert.

To remedy the evils that were pointed out as existing, various reforms were suggested. It would be impossible, even cursorially to give a statement of all the plans for reform that have been proposed. Some of them are so novel and impractical that they deserve and have received only the attention that curiosity attracts. For example, Professor John Ordronoux proposes to "Remove all experts from the field of testimony and place them in that of arbitration." "Whenever a scientific question arises," he says, "whose solution i s material, let a **feigned issue** be made upon the points and referred for judgment, upon evidence agreed upon, to three experts, one to be selected by each party litigant and the third by the Court, such experts to sit and determine at once the question in dispute, and their opinion to be received by the jury as conclusive of the issue tried by them.

Another writer, after combating this proposition and truthfully remarking that "a feigned issue in a trial for murder would strike many as singular," proposes a plan not less unique and impracticable. "Why not," says he, "authorize the court to associate with itself an expert, who, jointly with the judge, would preside at the trial, direct and control the examination of witnesses, and sum up at the close before the summing up by the law judge. After his summing up, and before the jury are charged by the court, there would by an opportunity of questioning him fully with respect to all points not previously developed in the course of the trial.

It is enough to say of such a proposition that it simply would not be tolerated. In the same case, there might be several scientific questions arising as many experts to sit with the judge, which would lead

necessarily to the utmost confusion of the jury and destroy all regularity in the procedure of the trial.

It has also been suggested that, in certain cases, a certain number of medical experts shall sit upon the jury and hear the evidence as ordinary jurors. But how would such jurors be selected and paid; and what assurance would there be that they would be more likely to agree in the jury box than upon the witness stand?

The remedies which have been most frequently urged and most strongly supported, so far as medical expert testimony is concerned, have been thus summarized by Judge Bartlett:

1. "The appointment of a commission of experts in insanity cases to examine the person alleged to be insane, before the trial, and make a report to be read at the trial, where all the members of the commission must attend to be examined or cross-examined, as either party may desire.

2. "The appointment of a like commission in any case involving a question of medical expert evidence to report to the court and testify at the instance of either party, without any compensation except a fee to be fixed and paid by the State.

3. "The regulation of all matters calling for expert testimony to a commission of experts, who shall transmit their determination to the trial court, which must accept it as a fact conclusively established in the case.

4. "The appointment of expert witnesses who must qualify themselves to giye opinion evidence in the case without consultation with the litigants or their counsel, and who shall be compensated for their services out of the county treasury of the county in which the trial takes place."

It has also been proposed that the hypothetical method of interrogation should be abolished and that there should be a statutory prohibition against receiving expert evidence from any witness who has been paid or expects to be paid anything by either party except the regular witness fees allowed by law for his attendance in court.

In New York, Massachusetts, Illinois, Pennsylvania, and, perhaps, several other states, attempts have been made, through the legislature, to carry into effect one or another of these plans of reform. Bills for this purpose, approved by the State Bar Associations and by local medical societies, have been introduced in the legislatures of these states. So far as I am aware, no one of them has become a law. In my opinion none of them will and none of them should become laws.

The very fact that the existing system has so long prevailed in this country, that it is the necessary outgrowth of our free institutions and of those constitutional guarantees securing to every person a fair and impartial trial, and the fact that every attempt to carry into effect the pretended reforms assumed to be necessary in our procedure relat-

ing to the use of expert testimony, convinces me that these so-called reforms not only are not demanded, but that thev will not be met with favor or toleration by the people or by the practicing lawyer. They are subversive of some of our most cherished constitutional rights;they involve the importation into our judicial system of continental methods entirely at variance with and antagonistic to that spirit of individual liberty and security in which that system has been developed; and they are not, in my opinion, sustained or justified by reason or necessity.

It will be observed that all of these schemes practically involve the establishment of a body of official witnesses. The idea is derived from the practice which prevails in France and Germany, whose judicial systems are so different from ours that it will always be found difficult, if not impossible, to engraft a feature of those systems upon our own without impairing or destroying its character.

In the first place such schemes could have no practical effect without constitutional amendments involving changes so radical as to be antagonistic to our judicial institutions. Such amendments could not and should not be obtained. The fundamental and constitutional right of every litigant to summon such witnesses in his own behalf as he sees fit, is too sacred and important ever to be yielded for any cause whatever; and, in this matter, there would be nothing to be gained by it. How would any of the evils supposed to result from the present system be remedied by having the medical experts selected by the judge? What standard of qualification would the judge adopt in making his selections? What capacity would he have and what moitves would actuate him in making his selections? "A man may be a very good judge," says Judge Bartlett, "and yet be a very poor judge of doctors." "I should be very sorry," he adds, "to have to be treated by the physicians of several judges whom I have known in past years, and yet I am certain that in each case his physician would have been the first either of these judges would select for any official medico-legal preferment within his power to bestow."

The other experts to be selected it is very likely the judge would choose either from political reasons, or from solicitations and recommendations of friends of some favorite doctor. At least it is fair to assume that the witnesses chosen, for various reasons, would generally be men of only average ability. But, as has been well said by Dr. Henry Smith Williams, "mere average medical knowledge does not supply proper qualifications for expert testimony in all kinds of cases; as, for example, in cases involving chemical and microscopical examinations, or inquiries concerning mental conditions—cases demanding the use and application of quite different kinds of technical knowledge. A physician may have the best professional training and the highest standing in his profession, and yet be utterly incapable of making a

thorough microscopical or chemical examination, or of forming a really competent judgment as to the mental condition of an obscure case of alleged insanity. Clearly, then, a man should not be permitted to qualify as an expert simply because he has good professional standing as a physician."

Sir James Fitzjames Stephen, in his History of the Criminal Law of England, shows the incongruity of introducing official experts into the common law system of administering justice, like those proposed in the schemes above mentioned, and declares that he has the strongest possible opinion in favor of the maintenance of the present system. "Our present system," he says, "provides a definite place and definite rights and duties for the parties, the judge, the jury, and the witnesses. What room there is for any other person in the proceedings I do not see. It is impossible to say what an expert is to be if he is not to be a witness like other witnesses. If he is to decide upon medical or other scientific questions connected with the case so as to bind either the judge or the jury, the inevitable result is a divided responsibility which would destroy the whole value of the trial. If the expert is to tell the jury what is the law—say about madness—he supersedes the judge. If he is to decide whether, in fact, the prisoner is mad, he supersedes the jury. If he is only to advise the court, is he or is he not to do so publicly and to be liable to cross-examination? If yes, he is a witness like any other. If no, he will be placed in a position opposed to all principle. The judge and the jury alike are and ought to be instructed only by witnesses publicly testifying in open court on oath. It never would be and never ought to be endured for a moment that a judge should have irresponsible advisers protected against cross-examination."

As constitutional obstacles, which, in my opinion, cannot and ought not to be removed, prevent legislation which will confine litigants to officially selected experts, it is apparent, to say the least, that the plan of having them selected by the judge would be of no practical value.

One of the reasons suggested why some change in the present system is needed is because trials are often prolonged by the number of expert witnesses called and the time of the court consumed in cross-examinations to test the skill or knowledge of such witnesses and the correctness of their opinions. But this criticism, I conceive, is wholly without merit. Under the present system, the court has ample power to limit the number of witnesses and the range of the testimony, and confine the examinations and cross-examinations within reasonable limits.

It has also been charged that, under the present system, there is no satisfactory standard for determining the qualifications of medical experts. If this were true, what remedy for this evil do the schemes

above mentioned afford? All of them necessarily lack the requirement of any particular qualification of professional learning and ability on the part of the experts to be selected by the court. The discretion of the judge, as to the qualification of the experts to be selected by him could not be controlled, and, under the proposed schemes, if he erred in his selection, there would be no way of correcting the error.

The charge made, however, is entirely without foundation. As stated at the beginning of this paper, it is only physicians and surgeons of practice and experience who are regarded as experts. They are permitted to express opinions only upon questions strictly embraced within their profession and practice. A specialist, who has devoted his attention to diseases of the eye and ear, would not be permitted to testify as to mental diseases. To quote again the language of Dr. Williams: "A physician may have the best professional training and the highest standing in his profession, and yet be utterly incapable of making a thorough microscopical or chemical examination, or of forming a really competent judgment as to the mental condition of an obscure case of alleged insanity. Clearly then, a man should not be permitted to qualify as an expert simply because he has good professional standing as a physician." "And," says Judge Foster, "An American judge, unless greatly deceived, will not permit a clearly incompetent person thus to qualify."

Under the present system, before a person holding himself out as a physician can testify as an expert, he must prove in open court, to the satisfaction of the judge, that his training and experience qualify him to express an opinion upon the questions involved; and as to his qualifications, he is subject to cross-examination. More than this, he is liable to be called upon, on cross-examination, to sustain his opinions by valid and sufficient reasons—his ability or lack of ability to do which the jury may rightfully consider in determining the value of his opinions. In other words, the expert must not only show that his opportunities have been such that he ought to be able to form a correct opinion, but he must demonstrate that his ability is sufficient to enable him to do so. Under the proposed schemes of having medical experts selected by the court, it is apparent that no opportunity is thus afforded to test their ability, learning and experience.

Another charge against the present system which has been the occasion for frequent outbursts of intemperate and extravagant statements on the part of many writers and judges, is the alleged conflicting, and, hence, unreliable character of the evidence produced by medical experts. Concerning this charge, I agree with Judge Foster, that "it seems hardly becoming for the legal profession to indulge in severe criticism, since there is no profession so strongly characterized by differences of opinion on every subject—lawyers as well as judges constantly disagreeing, and the latter not infrequently over-ruling

one another's decisions—unless it be the clerical profession, the members of which, it may have been observed, are not entirely unanimous in their interpretations of the Holy Scriptures." We are all aware that, in the most important cases that have come before the Supreme Court of the United States, admittedly the ablest and most distinguished judicial tribunal in the world, there have been several conflicting opinions, no one of which could be reconciled with the others. And yet he would be a bold person, indeed, who would suggest that, for this reason, there should be some change in the form or makeup of that court.

It has been my experience, and the experience of many able lawyers with whom I have conversed, that, as a rule, in the trial of cases, medical experts, upon the same state of facts, express the same opinion when the question is one about which there is a generally accepted opinion in the profession. When a question arises about which there is no such generally settled opinion in the profession, which is undergoing investigation and experimentation and tests, there unquestionably are and it is natural that there should be, differences of opinion among physicians and surgeons. It would be strange and unfortunate if such was not the case. "If there were no disagreement," says Judge Foster, "investigation and experiment would cease; and science, literature and art would sink to a dead level of stupidity and laziness If scholars and learned men had come to a condition of unanimous agreement a hundred years ago, we should have had none of the marvelous discoveries and inventions—none of the magnificent victories and triumphs in medicine and surgery—that have distinguished and illumined the closing years of the nineteenth century."

If members of the medical profession differ among themselves in their opinion upon a certain question, is it not best that the jury should know the fact in order that they may reject, as they should and are likely to do, all that is mere speculation and unestablished theory? This is certainly as well as that the judge should select witnesses who cannot agree, and much better than that he should select witnesses because they entertain the same, and, perhaps, the wrong opinion.

The most frequent complaint, however, and the greatest outcry against the present system is that, under this system, as it is claimed the medical expert becomes the hired advocate of the litigant in whose behalf he testifies; that he is employed and paid by one of the parties to the action and, on this account, consciously or unconsciously, becomes a partisan whose opinions are moulded to promote the interests of the party in whose behalf he is called to testify. Pages could be filled with quotations from the law books criticising in the severest and most extravagant language—and often in terms indicating dis-

honesty and corruption—the medical expert who has accepted compensation for his services from one of the litigants. Are these criticisms just, and is the practice complained of a serious evil?

There was a time in the history of the law, when the parties to an action, and all persons having a direct interest in the result of the trial, were not permitted to testify, because it was assumed that their interest in the controversy would prevent them from telling the truth except when it was to their advantage to do so. With the advancement of civilization, a demand arose that trials should be simplified in procedure and be confined to a fair and impartial investigation of the controversy between the parties. As one of the natural results of this progressive spirit, there came finally to be a general conviction that the rule excluding witnesses on account of interest in the cause worked injuriously and, between 1850 and 1860, it was abolished in England and generally throughout the United States. It was found that the low estimate of human character, which was responsible for the rule, was unjustified; that witnesses generally testify to the truth even when they have an interest in the result of the trial; that the rule often amounted to a denial of justice; and that better results were obtained and more accurate conclusions reached when all parties were permitted to testify publicly, subject to the right of the jury to determine their credibility and the weight of their evidence.

There probably have been, and perhaps there are today, doctors whose testimony could be purchased. Under the present system, if a doctor, who has sold his opinions, testifies falsely, he is almost certain, under cross-examination, to disclose the fact, or to discredit certain, under cross-examination, to disclose the fact, or to discredit himself with the jury to such an extent as to render his evidence valueless. At least, there is the opportunity, by cross-emaxination, of testing in every way his credibility. Under the proposed schemes, if a doctor has sold his opinions, there are little, if any, means of discovering the fact.

To enable a medical expert to form anything like a correct opinion upon many questions of medical science about which he may be asked to testify, it is usually necessary that he should inform himself, as accurately as possible, of the facts that each party is likely to try to establish in the course of the trial. He will usually be required to spend more or less time in studying and reflection upon the questions presented for his consideration, and in preparing himself to answer the questions likely to be propounded to him. He is often required to make careful chemical, microscopical, and anatomical examinations in order to enable him to form and express an accurate and intelligent opinion. For this work, for which he has become fitted only by years of patient and costly study, he is certainly entitled to compensation—and to such compensation as his reputation and the value of his time

authorize him to demand. We cannot get the best men to do this work for any minimum or average fee which might be sufficient for beginners or men of average talents, and we should not expect to do so. The legislature cannot deprive the medical expert of his right to require just and reasonable compensation for his services and, therefore, the compensation that such an expert should receive for his opinions and the labor involved in fitting himself to form an opinion, cannot well be regulated by statute. The constitution of the State provides that "no man's particular services shall be demanded without just compensation." In the case of Buchman vs. State, 59 Indiana, 1, Judge Worden, in reversing a judgment committing Dr. Buchman for contempt for his refusal to give his professional opinion on a certain question of medical science until he received just compensation therefor, says:

"If physicians or surgeons can be compelled to render professional services, by giving their services on the trial of criminal cases, without compensation, then an eminent physician or surgeon may be compelled to go to any part of the State, at any and all times, to render such services without other compensation than such as he may recover, as ordinary witness fees, from the defendant in the prosecution, depending upon his conviction and his ability to pay. This, under the general principles of law and the constitution of the State, he cannot be compelled to do. If he knows facts pertinent to the case to be tried, he must attend and testify as any other witness. In respect to facts within his knowledge, as before stated, he stands upon an equality with all other witnesses, and the law, as well as his duty to the public, requires him to attend and testify for such fees as the legislature has provided. Not so, however, in respect to his professional opinions. In giving them he is performing a particular service, which cannot be demanded of him without compensation."

The fact that a party to the litigation employs and pays such an expert for his work—not covertly, but openly and with the knowledge of all concerned—ought not, in my opinion, to detract in the slightest from the value of the expert's opinions. It is not in the least likely, if the witness is a man of good standing and reputation, that his opinion will be influenced by the compensation he receives. It is contrary to all experience that it should be so, for it is a well established fact that, among professional men of character, pride of opinion outweighs all other considerations. If the witness is not a man of good standing, if he has no regard for his opinions or reputation, if he has not within him the instincts of his profession, all these facts may be developed and, in connection with his manner upon the stand, his frankness or lack of frankness, his readiness and ability to answer the questions propounded to him, together with the opinions

of other witnesses, will go to the jury, who will determine and usually determine correctly, the credit to which his evidence is entitled.

While it seems to me, therefore, that the general condemnation of medical expert evidence so frequently indulged in is altogether without justification, and that any change in our system of receiving such evidence in the trial of cases is wholly unnecessary, if not impossible, I do not wish to be understood as saying that the practice under this system has at all times been free from abuses.

As a general rule, the criticisms of medical expert testimony found in the opinions of judges, when confined to the facts of the particular case before the Court for decision, are fully justified. There is no doubt but that, in particular cases, there have been serious abuses resulting from the admission of such testimony. Trials have been unduly prolonged by the number of such witnesses allowed to be called; "days and even weeks have been consumed in cross-examinations to test the skill and knowledge of the witnesses and the correctness of their opinions, wasting the time and wearying the patience of both court and jury, and perplexing instead of elucidating the questions involved in the issue;" witnesses have been permitted to express opinions whom it would be gross flattery to designate as experts and whose ignorance of the principles of medical science was only equalled by their presumption; and disgraceful exhibitions of disputes between the doctors called to testify have occurred, which were manifestly the result of partisan or personal feeling. While these cases are exceptional and have become fewer and fewer each year, decreasing as the requirements for better and higher education among the members of the legal and medical profession have increased, until today they are of rare occurrence, it is to be regretted, on account of the legal as well as the medical profession, that they have not entirely disappeared. They will do so with proper efforts on the part of the members of both of these professions. It is within the power of the judge to prevent some of the abuses mentioned. As we have said before, he can and should limit the witnesses to be called to a sufficient and proper number and confine the range of the cross-examination within reasonable bounds, and he can and should require every witness who offers himself as an expert to show that he has learning and experience sufficient to entitle him to express an opinion. The lawyers engaged in the trial can, and reputable lawyers will, assist the judge by refraining from any attempt to abuse their privileges, by avoiding all efforts at pettifogging and chicanery, by observing the rules of law, and by confining themselves strictly to the matters involved in the case they are trying. Much, also can be done, and ought to be done by members of the medical profession which would tend, not only to prevent many of the abuses mentioned, but to do away with much of the popular prejudice against medical expert testimony. In concluding this paper, I cannot do better

than state, in the language of Judge Bartlett, what can thus be done on your part. "You have," says Judge Bartlett, "a code of medical ethics which every physician and surgeon is bound in all professional honor to observe. By that code you regulate your own conduct in the practice of medicine, and insist that those who join the ranks of your profession from year to year shall agree to regulate theirs. No statute could practically be more binding. Why may you not extend its provisions so as to embrace the conduct of the medical man when he assumes the role of the expert witness? The matter is absolutely within your own control. You can declare in your code that a certain course of action on the part of a medical expert shall be deemed honorable and professional, and that a certain other course af action shall be dishonorable and unprofessional. The first steps in erecting such amendments in your professional law would necessarily be tentative. Mistakes would be made which you would have to correct. Rules from which the most good was expected might prove useless, and others which pomised much less might prove to be the most effective of all. But in making them and changing them, you would be independent of the legislature; you could act solely for the good of your profession untrammeled by official influence or power; and so far as you desire advice from the bench or bar, I am sure it would gladly be afforded. A signal advantage of dealing with the subject in this way is that it would involve no interference with existing rules of judicial procedure. The rights of litigants or the manner of trying lawsuits would in no wise be affected. The needed reforms would be brought about by the compulsory operation of your own code of ethics acting personally upon each member of your profession. That code, amended as I am sure it might be if the physicians and surgeons of this country took the matter seriously in hand, by commanding medical experts to do what is right and subjecting them to professional censure and obloquy if they did what was wrong, would be more efficacious than any law on the subject which any legislature could enact. It would be your own law, adopted by yourselves, and it would have that powerful sanction which belongs alone to laws which are a natural growth out of the conditions which lead to their adoption."

Through such efforts as these, on the part of the members of the legal and medical profession all serious abuses resulting from the present system of receiving medical expert testimony will disappear and this class of evidence will gain and retain that respect and confidence of the people to which it is entitled.—The Fort Wayne Medical Journal-Magazine.

Medico-Legal Bulletin.

PUBLISHED MONTHLY BY THE
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Fort Wayne, Indiana

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THE MEDICO-LEGAL BULLETIN is issued on the first of each month, in the interests of the medical profession from a Medico-Legal standpoint, and will spare no endeavor to furnish valuable news and information relative to legislative enactments and judicial decisions affecting the profession. Communications on these subjects are solicited from all interested. Reprints of contributed original articles will be furnished, without charge, to authors making request.

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"DEFENSE OF MALPRACTICE SUITS IS GOOD" AND ANYTHING ELSE IS INSUFFICIENT.

I have been considerably interested in the features of the following case of alleged malpractice: The patient claimed great suffering and swelling after the operation; involving the sublingual and maxillary glands. A local anesthetic was used in the operation, and some sloughing must have followed. Patient returned to the dentist for treatment and was progressing nicely. A prominent member of the medical fraternity in this city was called at this stage and he made such disparaging remarks as "the mucous membrane is lacerated; the bone is fractured." This evidently frightened the patient and suit was entered against the dentist who extracted the tooth.

The casualty company insuring the dentist against malpractice suits employed me to examine the patient's mouth, and I found no indication of excessive laceration where the tooth was extracted, neither did I find any swelling or glandular involvement. The patient was very bitter against the operator, and I soon discovered that the statements made by the physician, "lacerated mucous membrane and fractured bone," were at the bottom of her complaint.

I discouraged the patient from bringing suit since I found a superior right central badly abscessed, loose and discharging pus freely from a large fistula above the root. Upon questioning her I found this condition developed immediately after the extraction, and in my mind was sufficient cause to have produced the suffering, since there was a

chronic abscess, and doubtless some necrosis at the root of this tooth. I could not pacify the patient and could readily see she was being advised by counsel.

In a few days I was advised that the company had paid the patient damages to the amount of $300, based on the statement principally of the physician in charge. The kind of policy or contract held by the dentist was the judgment-paying class and not the class pledging the expenditure of a large amount in defense. Another feature of this case was that the patient was sent to Dr. Prinz for treatment of abscessed central, but never came, which leads me to believe that she was advised to not see any other dentist until her suit was settled.

My purpose in making this report is to vigorously condemn contracts held by dentists having judgment paying clauses in their defense policies, as this feature proves to be the source of a division of the spoils between dishonest attorneys and the patient.

To my knowledge, the dentist reluctantly gave his consent for settlement, much preferring a defense.

I think the dental profession should take this matter up and refuse protection offered by companies having a judgment paying clause and at the same time denounce such statements made by the physician in this case which appealed to the ignorance of the patient.

I would wager a goodly sum that friends of this patient will enter like complaint against some other dentist upon the slightest provocation. No reputable practitioner need fear judgment who practices methods commonly employed by other reputable men. The law is very clear in this regard.

The Physicians Defense Company offer a contract for our protection which guarantees the expenditure of $5000 in defense of any one suit which I consider ample protection, and under no circumstances will they compromise.

I firmly believe such annoyance to the dentist could be avoided if physicians and surgeons were more considerate of our work. No physician should make such abstruse and complex statements to an unintelligible patient, which tends to produce enmity toward their dentist.—F. K. Ream, M. D., D. D. S.

The report of Dr. F. K. Ream printed in this issue, certainly should sound a warning note to physicians as well as dentists who contemplate taking up policies protecting them against malpractice suits. In this case, a reputable dentist was sued by a patient upon whom he had operated with good results. An abscess at the root of the tooth became chronic. The patient was examined by a physician employed by the company defending (?) the dentist. The physician who by the way is an "expert" on all matters medical, protested that the patient had been injured by the dentist. The company re-

fuses to entertain the idea of fighting the case out in court on its merits, but settled the controversy by payment of $300 to the patient. Thus, the dentist was placed in the position of one who had really done wrong and was apparently willing to pay for it. The affair is simply a blackmailing scheme aided and abetted by the physician, with the commercial economy of the casualty company employed to defend the dentist forming the background.

The lesson to be learned from this case is, first, that no physician or dentist should take out a policy protecting him from malpractice suits except where it specifically states in the body of the policy that the company will not settle any claim without the policy-holder's consent. There are many of us who have never given much attention to the sharp lines of difference between policies of this kind. It is far better to have a policy which simply agrees to expend a sum of money in defense of any malpractice suit than it is to have one which either pays a judgment, or else settles a case by compromising the professional man's reputation and establishing an encouraging precedent for other blackmailers to follow suit.

And we cannot speak too harshly of this medical "expert expert" who prostituted himself for a sum of money to falsely state that the dentist's patient had been injured. This gentleman has been before the "lime-light" in no enviable parts on many occasions in the St. Louis courts. He is always to be found on the "shyster" side of the case, ready, like a penny-in- the-slot machine, to say anything in prosecution or defense of anything, if a suitable "price" is forthcoming. In the words of a well-known local politician, "he is no cheap man; he always delivers the goods if paid in advance."—R. B. H. G. —Medical Fortnightly.

CODE PLACED BEFORE LIFE—DOCTOR MUST NOT WARN EMPLOYER OF PATIENT'S ILLNESS.

London, May 17, 1905.

Is a doctor justified in violating the code of medical ethics in order to avert a possible disaster that may cause a great loss of human life?

That in a nutshell is the question which a perplexed member of the medical profession has submitted to the British Medical Journal for solution and has been answered in effect by that high authority that his first duty is to stick to the code, let the consequences be what they may. As the case on which the moral conundrum is based is a remarkable one, and the etiquette of the profession is about the same on both sides of the Atlantic, it is a matter that will possess some interest for American readers.

It appears that a certain doctor who is engaged by a railway provident society, managed by the men and not by the company, was

consulted by a signal man who was found to be suffering from heart disease, that might cause him to drop dead at any moment, or without warning render him incapable of attending to the work on the performance of which depended the safety of thousands of passengers.

ILL MAN REFUSES TO QUIT JOB.

On this account the doctor urged him to seek some other employment where his liability to sudden death or collapse would not endanger other lives. The man refused. Other jobs were not easily found, especially by a man suffering from heart disease. Self-preservation was the first law of nature. Therefore he would stick to his job, and the traveling public who used that particular section of the line over which he stood guard would have to take their chances. By such reasoning he found it easy to justify his decision.

But the medical man was haunted by the knowledge that his patient's condition might lead to an appalling disaster in which scores of lives might be lost and hundreds be maimed and injured. All possibility of such a terrible catastrophe would be averted if he should inform the railway company of the signal man's physical condition. That would lead to his prompt removal from the signal box. He might be given another job or he might be sacked. But if the doctor should inform the company of the facts that had come to his knowledge in his professional capacity would he not be guilty of a breach of the obligations imposed upon him as a physician? In this dilemma he asked the British Medical Journal to decide for him.

FIRST DUTY IS TO PATIENT.

"Our correspondent," says the editor, "has done his duty by pointing out to the patient his unfitness for work, but he would be violating the rule of professional secrecy if he communicated to the company the facts which have become known to him in his professional capacity."

This amounts to saying that considerations of medical etiquette are of more importance than the security of railway passengers. With this opinion the public hardly will agree. The rule that doctors should not disclose what their patients tell them is doubtless an excellent one in the vast majority of cases. But this seems to be a case in which incalculably greater harm may arise from sticking to the rule than by making an exception to it. It would be interesting to obtain the opinions of American physicians on the subject.—Ex.

The Travelers Insurance Company.
Hartford, Conn.

May 5, 1905.

To the Field Force:

The Physicians and Surgeons Liability line has not yielded satisfactory results and is considered generally undesirable by the Company.

The Company has decided to cease writing this line on and after June 1, 1905. Supplies in the hands of agents may be destroyed

Yours truly,

J. C. Dunham.
President.

We understand that the above letter was issued by the Travelers Insurance Company after several rulings had been made by the attorney generals of different states to the effect that the business of insuring physicians and surgeons against damages growing out of malpractice was illegal.

The letter further emphasizing the force of the contention maintained for the past several years by the Physicians Defense Company, that a policy indemnifying a physician against a judgment for damages growing out of malpractice tends to encourage that class of litigation. That is, that an indemnity policy in the hands of a physician is an invitation on the part of patients to bring suits; and the size and number of the judgments rendered recently against physicians and surgeons holding indemnity policies has no doubt influenced the action of the Travelers Company in this regard.

Judicial Decisions.

Under this heading will be presented each month information relative to judicial decisions affecting the medical profession.

X-RAY MACHINE UNNECESSARY.

The case of Beadle vs. Paine et al., 80 Pac. (Ore.) 903, was one in which defendants were charged with negligence in the treatment of Beadle's broken and dislocated arm.

The Plaintiff attempted to have the Court establish a doctrine to the effect that a specialist in surgery was required to have an x-ray machine for diagnosis of fractures and the like.

The Plaintiff did succeed in showing that one physician in that locality possessed an x-ray machine, but the Court allowed Defendant upon cross-examination to show by the witness that it was not usual for members of the profession in that vicinity to possess x-ray machines and that there was but one machine in that locality.

The Court instructed the jury that it was not negligence for a physician or surgeon not to have an x-ray machine unless it was usually employed by the physicians and surgeons in that locality.

The Defendants were acquitted.

DAMAGES.

Lennox vs. Street Railway Company, 93 N. Y. S. 230, a personal injury suit, holds that in such case no damages can be recovered for inability to bear children as a result of the injury, and that it is clear that pecuniary damages suffered for the loss of children unborn and unconceived are too remote and speculative to constitute an element proper to be submitted to a jury.

PRIVILEGED COMMUNICATION.

Accident Insurance Company vs. Munson, 103 N. W. (Neb.) 688. The prohibitions against a physician testifying to confidential disclosures by a patient, are for the benefit of the patient, who can waive this privilege.

The stipulation in a life insurance policy that the proofs of death shall consist in part of the affidavit of the attending physician is held a waiver of the prohibition against the physician's testimony.

AVERAGE SKILL.

MacKenzie vs. Carman, et al., 92 N. Y. S. 1063. Defendants in this case treated Plaintiff for fracture of bone of the arm about one inch above the wrist. Splints were applied to hold bones in place; when these splints were removed two black spots appeared on the surface of the wrist, which subsequently developed into ulcers, and resulted in permanent injury to Plaintiff's arm. Judgment found against both Defendants. Dr. Carman appeals.

The Court says: The law requires a physician and surgeon to possess the skill and learning which is possessed by the average member of the medical profession in good standing, and to apply that skill and learning with ordinary and reasonable care. He is not liable for a mere error of judgment, provided he does what he thinks is best after a careful examination. He does not guarantee a good result, but he promises by implication to use the skill and learning of the average physician, to exercise reasonable care and to exercise his best judgment in the effort to bring about a good result.

After a review of the evidence relative to Dr. Carman's treatment the Court says it finds his treatment to be just what the Plaintiff's expert described as "good surgery by good surgeons," and the case is therefore decided in the doctor's favor.

OTHER TREATMENTS INADMISSIBLE.

Shockley vs. Tucker, 103 N. W. (Ia) 360, is a recent case reversing the judgment below and deciding the appeal in favor of the doctor.

Negligence was charged in the use of an x-ray machine and it was claimed that the patient was burned while being treated for appendicitis.

In the trial of the cause a physician was allowed to testify that he had performed the operation of skin grafting on other persons than the Plaintiff who had been burned by the x-ray while under the Defendant's treatment. The Court, because of the admission of this evidence, reversed the case, holding, with the current of authority, that success or failure in other treatments is not pertinent to the case and that the question is whether or not the physician or surgeon used the proper skill and care in the treatment of the case at bar.

SUFFICIENT EVIDENCE OF CAUSE OF GLAUCOMA.

O'Neil vs. Metropolitan Street Railway Co., 93 N. Y. S. 145, A woman 61 years of age who was the principal of a public school, and whose eyesight had been remarkable good, was, through the negligence of the Defendant, precipitated to the pavement with considerable violence, landing on her head and left shoulder so that she sustained a scalp wound an inch and a half in length nearty on top of her head,

above her left ear, and her left collar bone was fractured. There was evidence indicating that she was stunned, and that her eyesight immediately became blurred; also, that immediately after the accident she had such intense pain in her eye and in her head between the wound and the eye that she did not feel the injury to the collar bone, and continued to have these pains constantly until shortly before the trial, when she had them at intervals of two or three weeks. The fracture of the collar bone united and healed in about three weeks, and she was afterward able to resume her duites as principal of the school. But about fourteen months after the accident occurred she began to have special trouble with her eye, and within the next few weeks consulted two eye specialists, one of whom operated for glaucoma, and during the operation discovered a subluxation of the lens, which, in his opinion, caused it. The court is of the opinion that the testimony of the plaintiff, showing a continuity of pain in this eye since the accident, supported and sustained by the medical testimony introduced in her behalf, fairly sustained the finding of the jury that the glaucoma of the left eye resulted from the injuries she received through the negligence of the defendant. It was undisputed that the glaucoma in the left eye destroyed the sight of that eye and communicated to the right eye, ultimately resulting in permanent total blindness, and, the court holds, the defendant being responsible for the plaintiff's total blindness, it needed no argument to show that a verdict for $13,580 damages was not excessive.

"DETECTION OF POISONS AND STRONG DRUGS."

We have the honor of acknowledging receipt, from the publishers, P. Blakiston's Sons and Company, Philadelphia, of a copy of Dr. Wilhelm Autenrieth's "The Detection of Poisons and Strong Drugs." The translation is by William H. Warren, Ph. D. The methods set forth for the purpose of detecting the presence of poisons and strong drugs in the human body are very simple and comprehensive. Numerous chemical tests are given as well as the diagrams of instruments and mechanisms used in autopsies and the treatment of the human organs for the purpose of ascertaining the presence of poisons. The book is intended primarily for the use of the medical profession. It contains much, however, which would be of great advantage and use to the legal profession. Especially on cross-examination the rules and methods for the detection of poisons and their effect upon the body will be of great value to the advocate in any case involving medical jurisprudence.

There appears to be a successful attempt on the part of the author to set forth all the practical tests known to the science. The language of the book is simple and clear and the entire work is entirely comprehensive.

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in this county, under the Laws of this State. Certificate No.....from the.....

I agree that this contract shall not cover suits for damages in which services were rendered while under the influence of liquors or drugs.

I agree to notify the Company at once by telegraph or telephone when demand is made, or suit commenced for damages, and will not make nor contract any expense without the written authorization of the Company, and will contribute my own time and assistance in defense of the case without charge to the Company.

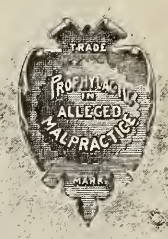
I warrant each and all of the statements made herein to be true and complete. I also warrant that this application has been made and written by myself or duly authorized agent and that I understand its provisions

Date.....190... (Applicant's Signature).....

*** Cross out professions not practiced.**

Received H. O. ***Issued***

CAPITAL STOCK $100,000 NUMBER INCORPORATED UNDER THE LAWS OF INDIANA



The Physicians Defense Company

FORT WAYNE INDIANA

Long Distance Telephones | BELL, 45 HOME, 1338

In Consideration of the written and printed application, which is hereby made a part of this contract, and the sum of Fifteen Dollars, receipt of which is hereby acknowledged, being the consideration for one year's defense, and the further payment of Fifteen Dollars annually in advance on the _____ day of _____ of each year during the life of this contract,

The Physicians Defense Company
(HEREINAFTER KNOWN AS COMPANY)

hereby agrees to defend the legally qualified Physician,

_____ of the City of _____, County of _____, State of _____ against all civil suits for damages for malpractice, based on professional services rendered by himself or his agent during the term of this contract, at its own expense, not exceeding FIVE THOUSAND DOLLARS in defense of any one suit, nor exceeding in the aggregate TEN THOUSAND DOLLARS in defense of suits based on services rendered by the holder hereof, within one year from the date of this contract, or within any one year for which this contract shall be renewed, all in the manner and upon the conditions herein below stated, to-wit:—

Immediate notice by telegram, must be given the company at the Home Office at Fort Wayne, Ind., of any suit brought or demand made; and the holder hereof shall immediately forward the summons, or other process served, and the complaint or petition filed; together with a full and complete history of the case and services rendered.

Upon receipt of notice from the holder hereof that a suit has been commenced against him for damages for civil malpractice, the company will employ a local attorney in whose selection the holder hereof shall have a voice, who, together with the company's attorney, will defend the case without expense to the holder hereof.

Such defense will be maintained until final judgment shall have been obtained in favor of the holder hereof, or until all remedies by appeal, writ of error or other legal proceedings shall have been exhausted, or until the sum of Five Thousand Dollars shall have been expended in said defense; provided said company shall not be under obligation to expend more than Ten Thousand Dollars in the aggregate in the defense of suits based on services rendered, by the holder hereof, during the original one year term or any renewed one year term of this contract.

Said company does not obligate itself to pay or to assume or to secure the payment of any judgment rendered against the holder hereof, in any suit defended by it.

The company shall not compromise any suit or claim for malpractice against the holder hereof. Nor shall the holder hereof, after the company has entered upon the defense of any such suit in behalf of the contract holder, compromise the same without the consent of the company in writing first thereto had, and by reimbursement of the company its expenses theretofore incurred.

No suit or claim will be defended by this company, under this contract, in which the cause of action arose previous to the date of this contract.

This contract does not cover criminal prosecutions nor suits for assault, criminal abortion, foeticide, homicide or other criminal act, or actions arising by way of counter-claim or recoupment.

The company may cancel at any time the unexpired portion of this contract upon written notice mailed to the holder hereof, and the unearned portion of the consideration therefor shall be returned to the holder hereof.

This contract does not take effect until the consideration therefor shall have actually been paid to the company or its authorized agent; but if the holder shall have paid such consideration and shall have received from the company or its duly authorized agent a memorandum certifying such payment and that the contract is to be subsequently delivered, then this contract shall be dated as of the date of such payment and shall be in force and effect from that date.

This contract shall not lapse at the end of the time as stated above if the holder hereof shall pay the annual consideration in advance at the Home Office in Fort Wayne, Ind., or to an authorized agent of the company, in exchange for the company's receipt, signed by the president and secretary and countersigned by the agent, but shall continue in force for the term or terms for which such annual consideration shall be paid; provided, however, that the liability of the company under such extension shall not be cumulative.

No consideration or agreement contained in this contract, or application for same, can be waived or altered in any manner by any person, other than the president or secretary, in writing endorsed hereon.

In Witness Whereof, The Physicians Defense Company has caused this contract to be signed by its president and secretary and its official seal attached hereto in Fort Wayne, Indiana, this _____ day of _____ 190__.

FORM 1

Miles F. Porter
President.

C. H. Merritt
Secretary.

Medico-Legal Bulletin.

THE MEDICAL WITNESS.

By Hon. John Cromwell Bell, District Attorney of Philadelphia.

RELATION OF LAW AND MEDICINE.

Acting upon the hint of one of your Faculty, I shall venture to make some observations and suggestions concerning that relation or branch of professional endeavor in which we are brought in contact with and supplement the efforts of each other. I allude, of course, to the trial of the medico-legal cases in courts of justice.

It is generally conceded that medico-legal investigation was first introduced into the practice of the courts by the penal code of Emperor Charles V, in 1532, but it is to the versatile and learned Italian genius, Paul Zacchias, who was born about half a century later, and who was body physician to Pope Innocentius X, and expert attached to the "Rota Romana," the highest court of appeals, that the title of founder or father of medico-legal science is ascribed. This title is justly his, because of his wonderful scientific research and teachings, concerning which he has left us a large number of essays, books and treatises, the chief of which is his great life work entitled "Questiones Medico-Legales." It is said that there is scarcely a question known to medico-legal science today which is not referred to in this important work.

It is not my purpose to trace the history and development of legal medicine, or medical jurisprudence, as the terms are interchangeably used—though, if the truth be told, it has not developed much, nor as it should; nor shall I emphasize by more than a mere passing word the propriety and necessity of more extended and complete courses in this science in our medical and law schools.

Dr. T. R. Beck, one of its most eminent and distinguished professors, defined it as "that science which applies the principles and practice of the different branches of medicine to the elucidation of doubtful questions in courts of justice," the "different branches of medicine," including physiology, pathology, anatomy, hygiene and the practice of medicine, surgery, midwifery and chemistry.

It is really astonishing when we stop to consider the great number of cases which are brought into our courts of justice, civil and criminal, which can only be settled by an appeal to medical knowledge. Such,

for example, are contested will cases, in which the testamentary capacity or soundness of mind of the testator is in issue, and similar cases in which the validity of deeds and contracts is attacked upon the same ground, as well as those cases in which the courts are given jurisdiction over the insane and their property. To these must, of course, be added all criminal cases in which the defense is insanity, and, under the recent act of the legislature, divorce cases, wherein insanity is the basis of the husband's or wife's application.

In all these cases a knowledge and application of the facts and principles constituting the physiology and pathology of the brain are absolutely essential to a proper determination of the rights of the suitors.

Again, it is obvious that a knowledge of anatomy and physiology is necessary in determining the nature and consequence of all wounds and personal injuries, and whether the same are homicidal, suicidal or accidental.

So, too, in all cases of murder, charged to be due to the administration of any one of the many poisons, as well as in all criminal prosecutions for the adulteration of foods by the admixture or addition of poisonous or deleterious substances or ingredients forbiden by the law, a knowledge of chemistry and the application of its principles and processes is indispensable.

Again, in cases of death from suffocation or drowning or starvation, and in cases of malpractice, pregnancy in the living or the dead, criminal abortion, infanticide, rape, etc., out of which cases grow issues affecting life, liberty, legitimacy, inheritance, property rights, life insurance moneys, etc., etc., an appeal to medical science and knowledge is imperatively necessary in order to a proper determination of legal rights and the administration of justice.

That you may realize I am not dealing in abstractions, let me add that during the two years in which I have held the office of District Attorney, nearly, if not quite all, of the cases which might be called important, which I have personally tried, have been prosecutions in which the medical evidence, the testimony of the doctor and of the chemist, has been the **sine qua non,** the all essential testimony in the case.

I have in mind the Webb murder case, in which a wife and mother-in-law were shot by a jealous husband, who afterward simulated insanity and refrained from uttering a word for many months; and the Hossey, Williams and Danz murder trials, wherein the charge was murder by poisoning; and the pure food prosecutions, begun at the instance of the Dairy and Food Commissioner, for adulteration of milk, butter, meats and liquors.

In the last one of these food adulteration cases tried, Commonwealth vs. Spencer, out of nine witnesses called by the Commonwealth

and ten called by the defense, seven on each side were chemists or physicians.

In the Common Pleas Court I think I am safe in saying that nearly if not quite one-half, of the litigation is accident suits, or suits for personal injuries, in which the doctors are the star witnesses for both the plaintiff and the defendant.

If you round the corridors of the city hall to the east wing, where the Judges of the Orphans' Court sit, you will find that the most important litigation engaging their attention is the contested will cases, in which the inquiry is as to the mental soundness of the decedent, or his capacity to make a will, in which cases the testimony of the family physician and the expert is that most strongly relied upon.

The same is true of the preliminary hearings in the Registrar's Court, wherein the wills are first offered for probate, while in the Coroner's Court, in which jurisdiction is taken of all cases of sudden and violent death from any cause whatever, the same determinative inquiry or appeal to medical knowledge is uniformly and necessarily made.

It would thus seem to be clearly evident that a medical man should have not only a fair knowledge of the science of medicine, but that he should also fit and qualify himself to act as a medical witness, or as a medical jurist, as the term is sometimes used.

May I then presume to give you a few practical suggestions, the observance of which may be to your advantage if and when you shall be called upon to so act.

Let us consider, first, what you should observe and do out of court or in preparation for trial, and next, in court or when giving your evidence.

1. INVESTIGATIONS IN ADVANCE OF TRIAL.

In the first place, the medical witness should assiduously cultivate his faculty of minute observation of all medical and moral circumstances As a learned judge once decalred: "**A medical man, when he sees a dead body, should notice everything.**"

If, therefore, you are summoned to the spot where a person has been shot or suddenly killed, you should in the first place make a note of the time, place and surroundings. The locality may afford persuasive evidence of the crime; for example, of infanticide, if a child be found in a cellar or in a cesspool, or of homicide, if a dead body be found with weights attached to it in a river. So, too, the trampled condition of the grass or ground, or broken down shrubbery, may indicate whether there has been a struggle. The finding of a pistol or any kind of deadly weapon is significant. If the body is in a room, instead of in the open, its exact location with reference to the furniture in the room, or its proximity to a pistol or knife, by which wounds on the body might have been made, or to bottles, glasses, cups, etc., in which poison

might have been taken, should be carefully noted. If there is any vomited matter near the deceased the same should be collected for purposes of future analysis. This is important in poison cases. Marks of bloody fingers on the wall or stairs, or door jamb; foot tracks and the direction of the same should be carefully noted.

A careful external examination of the body should then be made. Of course, the sex, height, weight, probable age and general appearance of the person should be observed. Any disarrangement of the clothes should be carefully noted; whether there is any blood upon the same. The hands should be examined to see whether they are stained with blood or blackened with powder; whether they are clutching anything; for example, hair or clothing. The clothes should then be removed, and the body critically inspected. A careful examination should be made as to the exact location, depth and direction of all wounds; whether the weapon with which they might be supposed to be caused fits into them; whether the number of bullet wounds corresponds with the number of empty chambers in the revolver; whether the wounds are recent; whether there is any evidence of suppuration or gangrene. Fractures of the body will, of course, be noted, and in case of burns, their degree and extent.

In a word, as before observed, your observations should be most minute and careful; for though entirely unnecessary, it may be, in medicine and surgery, they are yet necessary in law—often vitally essential indeed—as determining whether the death was homicidal, suicidal or accidental.

DYING DECLARATIONS.

It may be that in the case we are considering, you arrive on the scene before the person dies, or that in your private or hospital experience you may be summoned to the bedside of a person dying from wounds or other acts of violence, and that a declaration may be made in your presence as to the cause of his death, or as the circumstances of the transaction which resulted in his death. Such declarations are admissible in evidence on trials for murder or manslaughter, where the person making them believes he is in actual danger of death, and that his recovery is impossible. They are received in evidence without being sworn to, because the law presumes that they are made under the sense of impending death, which is regarded as equivalent to the sanctity of an oath. The declarations may be made by signs, by writing or in any other manner of communication. They may be proved by the physician, though they are verbal, i. e., without being written down. But if time will permit, the physician should write down the statements, interrogating the dying man, if necessary, in order to get his meaning clear, writing down, however, his exact words, without adding the doctor's interpretation of them. If possible, the dying person

should then sign the declaration or make his mark to it, after it has been read over to him. Of course, in this, as in the previous case, you should make a note of the time and place when the declarations are made, who were present, etc., etc.

POST MORTEM EXAMINATIONS.

It not infrequently happens that post mortem examinations of the body are made in cases of sudden or violent death. The physician in such a case ought to be a skilled anatomist and pathologist, as well as a very close and careful observer. He should, of course, first make a complete examination of the locality and surroundings and an external examination of the body as above suggested.

In addition he must then also make a careful and systematic internal examination of the body. The stomach should be removed, tied at each end, placed in a separate vessel properly cleaned and prepared, and the contents, when removed, should be kept in a separate vessel similarly cleaned, and under no circumstances permitted to come in contact with other materials or organs of the body.

In the Williams case, in which Mrs. Williams was indicted for poisoning her children, it was proved that the stomach contained a large quantity of arsenic, but unfortunately same was not kept in a separate jar, but placed in a large jar together with the intestines, heart, lungs, liver and kidneys. Subsequent chemical examination of these organs revealed traces of arsenic in each of them, but there was a doubt as to whether such arsenic might not have come from the post mortem contact of these organs with the stomach and its contents in the large jar referred to. Hence, the proof was lacking that such arsenic had been absorbed in life, and a doubt therefore arose as to whether the arsenic had caused the death. Probably this doubt was resolved in favor of the defendant, and resulted in her acquittal.

Dr. Taylor gives the following additional directions to be observed in post mortem examinations, viz:

"The contents of the duodenum should be separately collected, ligatures being applied to it; the state of the large intestines, especially the rectum and the condition of their contents (the discovery of hardened fæces in the rectum would prove that purging had not existed shortly before death(; the state of the wind-pipe, throat and gullet, and whether there are in these parts any foreign substances, or marks of inflammation or corrosion (this is of essential importance, as it throws a light upon a variety of questions which may arise respecting death by suffocation from mechanical causes, or the nature of the substance swallowed); the state of the lungs and heart; morbid changes, etc.; the state of the brain and spinal marrow; the condition of the womb, ovaries and genital organs, as in the female poison has been sometimes introduced into the body by the vagina, or wounds have

been inflicted internally; the kidneys and the spleen should be submitted to examination; the liver with the gall-bladder should be removed for chemical examination; the urinary bladder, with any fluid contained in it, should be removed and placed in a separate jar."

This learned author adds that careful attention to the above points by the medical jurist will throw much needed light on the cause of death in poisoning cases, and a failure to observe these directions has rendered obscure many cases of death from wounds and poison.

In poison cases, in my limited experience, the pathological appearance of the stomach is most important; and a scientific inspection and examination of each and all of the organs that the examiners may be able to say whether they are in a healthy or unhealthy state, or contain any marks or traces of natural disease, is vital. Such examinations cannot be too thorough and exhausitve, especially of the kidneys, heart and brain; and in doubtful or obscure cases they should be examined with a microscope.1

In all poison cases the attempt of the skilled lawyer is to show that from the condition of the organs, particularly the heart and the kidneys, the deceased person might have died from a natural cause, e. g., heart disease or Bright's disease; hence, the necessity of proving that these organs were in a natural and normal condition.

The main effort of the defense in the Danz case, wherein Mrs. Danz and the Voodoo Doctor Hossey were convicted of the poisoning of William G. Danz, was to prove that he died from heart disease.

In two leading poison cases in the United States, that of Mrs. E. G. Wharton, charged with poisoning General Ketchum, and that of Dr. Paul Schoeppe, charged with poisoning Mrs. Steinneck, the defendants were acquitted, because the post mortem examination was not sufficient and complete.

EXHUMATION, PATHOLOGY AND CHEMICAL ANALYSIS.

Sometimes, particularly in poison cases, the body is required to be exhumed, and not only a post mortem examination made by the anatomist and pathologist, but also a chemical analysis of the various organs and tissues by the chemist. Such an exhumation and chemical analysis were made by Professor Meeker of the cadaver of William G. Danz in the case just referred to. I am sure that I could not do better than to refer to Professor Meeker for enlightenment and instruction as to the proper method to be followed. In my experience I have never been and never expect to be associated with a more careful, skillful and competent chemist and medical jurist.

To begin with, the body, when exhumed should be identified by

1. Kehoe vs. Commonwealth, 85 Pa. 127.
Allison vs. Commonwealth, 99 Pa. 17.
Commonwealth vs. Roddy, 184 Pa. 274.

the undertaker or some friend or relative in the presence of the medical examiner. In a recorded case of murder by poison, conviction almost failed owing to this precaution having been omitted.

The greatest care must be taken to **avoid contamination**. The jars used should be thoroughly and scientifically cleansed. Evidence of the presence of poison in the contents of the stomach was one rejected at a trial for murder because such contents had been hastily thrown into a jar borrowed from a neighboring grocery shop, and it could not be satisfactorily proved that the jar was clean and entirely free from traces of poison—in which the grocer dealt—when used for this purpose.

The stomach, intestines, liver, kidneys, heart, brain and lungs should be put in separate jars, also pieces of the muscular tissue. The scalp and hair should be put in another jar. In the Danz case, Professor Meeker also took a portion of the casket lining, portions of the earth around the grave, and of the water that percolated through the grave.

Not only must absolutely clean vessels be used, but the utmost care should be taken that the identity of the organs, tissues and substances examined should be preserved. The chemist should never let the same be out of his sight or custody. He alone should have the key to the chest or closet in which they are stored.

In the Williams case one of the jars containing a portion of the viscera was placed in a chest containing other jars and was lost. There was also evidence that one of these other jars was broken at one time and its contents spilled. When the life of a human being is at stake, as in charge of murder by poisoning, the slightest doubt is always very properly interpreted in favor of the accused.

In the case of the State of Virginia vs. Mrs. M. E. Lloyd, charged with poisoning her daughter with arsenic, it developed on the trial that the chemist himself had not personally received the organs examined by him, but that the same had been conveyed by a person since dead, and although several grains of arsenic were said to have been found, the identity of the stomach could not be positively established, and the defendant was acquitted.

In the conduct of the chemical tests, preparation of re-agents and of the tubes and apparatus for such tests, the same scrupulous cleanliness, accuracy and precision should be observed throughout. Each organ and tissue should be subjected to a separate test, a main test and then to confirmatory tests.

But for such scrupulous care, and scientific accuracy used by Professor Meeker in the Danz case, the Commonwealth could never have hoped for a conviction. When to this, however, was added his masterly and scholarly testimony in open court, given with like care, skill and precision, conviction became a certainty.

It remains to add in this connection that where possible the results of all tests and analyses should be brought into court and exhibited to the jury.

THE MAKING OF NOTES AND THEIR USE.

In all medico-legal investigations the practitioner should make full and complete notes and memoranda of his observations, and the results of his analyses, with the dates. These notes and memoranda should be entered at the time the observations are made or the analysis takes place. The advantage of such notes and memoranda, when thus made, is that the same may be referred to in court for the purpose of refreshing the memory of the witness.

This, then, is a brief outline of what a medical witness should observe and do in advance of trial; save only that if he is to give expert testimony he should read as far as obtainable the literature of his profession, and otherwise carefully prepare himself upon all the points bearing on the case.

II.—TESTIMONY IN COURT.

I come now to the second head or chapter of my discussion, namely, to the giving of evidence by the medical witness in court.

SUBPŒNAS.

In all of the cases referred to above it is supposed that he has knowledge of certain facts relative to the case, and if he does not come voluntarily, he may be compelled to do so by subpœna, upon paying him, if he demands it, the statutory witness fee and mileage. It is only where a witness has no knowledge of the facts of the case whatever, and is expected to give an opinion simply as an expert that there is a doubt as to whether he is obliged to obey a subpœna.2

Even in such a case his attorney would probably advise him to attend, though after he takes the stand he may decline to give any expert testimony—for his opinion or knowledge are his own private property—until he is compensated or a satisfactory agreement to do so is made with him.

RULES IN TESTIFYING.

Assuming, therefore, that the medical witness is present in court, what rules should be observed by him in the giving of his testimony?

Answering this inquiry, Dr. Taylor observes that two considerations should be borne in mind by him: **First**, that he should be well prepared on all parts of the subject on which he is about to give evidence; **second**, that his demeanor should be that of an educated man, suited to the serious occasion on which he appears, even though he may feel himself provoked or irritated by the course of examination adopted.

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2. Betts vs. Clifford, Warrick Lent. Ass. 1858.
Webb vs. Page, Carrington & Kirwan's Rep. p. 23, cited in Taylor's Medical Jurisprudence, p. 35.

Another learned medico-legal writer, Dr. Reese, says he should beware of any display of arrogance or assumption of manner or stubbornness or testiness of behavior, which are sure to make him appear to disadvantage in the court room. The questions put to him by the prosecution and defence alike should receive plain, direct and responsive answers. His replies should be terse, concise and distinctly audible, and except where explanation may be necessary, they should be confined strictly to the terms of the questions. It follows from the above that his answers should never be ambiguous, undecided or evasive.

Again, he should avoid, as far as possible, the use of technical expressions, putting his replies in as simple and plain language as possible. The jury who listen to him and are to be enlightened are, as a rule, unlettered men. Time and again I have heard the Judges in our Common Pleas Courts in accident suits request the doctor on the stand to please put his answer in plain English, so that the jury may understand him.

On a trial for assault and battery, a medical witness testified that on examining the prosecutor he found him "suffering from a severe contusion of the integuments under the left orbit, with great extravasation of blood and ecchymosis in the surrounding cellular tissue, which was in a tumefied state; there was also considerable abrasion of the cuticle." Judge: "You mean, I suppose, that the man had a black eye?" "Yes, Judge." "Then, why not say so at once?"

EXPERT TESTIMONY.

The foregoing suggestions apply to all cases in which the medical man appears as a witness in court, either as a non-expert or as an expert.

It is in the latter capacity, however, that he usually appears. Indeed, even if he be summoned simply to testify to facts and symptoms observed by him, questions and replies which belong to the domain of expert testimony will almost invariably enter into his examination before he leaves the stand.

A few further remarks, then, upon the expert medical witness and the rules of law governing the giving of his testimony may be pertinent.

In legal contemplation, the medical expert is one who, by reason of reading, study, practice or observation, has a special and superior knowledge on the subject concerning which he testifies.

A preliminary examination is usually had to test and determine the witness' qualification as an expert. Whether after such examination he shall be deemed possessed of the necessary qualifications is a question for the court. Generally, however, if the proffered witness has any pretense to special or superior knowledge, his evidence is admitted, leaving to the jury to determine what weight shall be given to it.

TESTIFIED TO AN OPINION.

We will assume, then, that the witness qualifies as an expert. You understand, of course, that such expert or skilled witness testifies to an **opinion, his opinion**, predicated upon facts which are first testified to either by himself or by others—usually by others.

The usual method resorted to to obtain his opinion is to embody the facts upon which he predicates it, in a hypothetical question. Another plan, the validity of which is equally well established, is to have the expert express his opinion upon a defined portion, though not the whole of the testimony, not contradictory in itself, and the truth of which is expressly assumed, and with the whole of which testimony he has first been made acquainted, either by sitting in court and hearing it or by reading it. This was the method pursued in the famous contested will case of Yardley and Cuthbertson, 108 Pa. 395, in which case Dr. Pepper, Dr. Jones and Dr. Hunt sat in court and heard the testimony of the proponents of the will, and then were asked to give their opinion, predicated upon that evidence, as to the mental capacity of the testator.

Our Supreme Court held that this was a proper form of question to be put to an expert. It should be noted, however, that the expert is not permitted to give his opinion upon the whole of the evidence, or upon any contradictory portions of it, for that would be to usurp the functions of the jury. The above form of question or method of examining the witness was pursued in the Danz and Hossey trials, and though assigned for error was upheld by the Supreme Court.

In re MEDICAL BOOKS AND STANDARD AUTHORITIES.

As to the sources from which the expert gets his special and superior knowledge, entitling him to testify as such agent, the courts of last resort have held that he is qualified to testify, though he may have had no practical experience, and his opinion is based entirely upon his reading. Thus, in State vs. Wood, 53 N. H. 484, on a trial for abortion, it was held-that a physician was qualified as an expert, and his opinion was admissible as to the effect of a certain drug upon the womb, though such an opinion was derived entirely from his reading. Again, in Hardman vs. Brown, 162 Mass., 585, it was held that a practicing physician of long experience who knew what the medical authorities said in regard to tumors was qualified to testify as to whether in his opinion the tumor at the base of the brain was the exciting cause of the person's illness, though in his practice he had not been familiar with tumors on the brain. So in the case decided by the Supreme Court of Michigan, People vs. Thacker, 108 Michigan 652, it was decided that a practicing physician who was a graduate of a medical college, and had qualified himself by reading books and hearing lectures, and had a definite opinion of his own, may testify as an expert on the subject of poisoning, though it was not shown he had had any

experience of his own in poisoning cases. (See also Siebert vs. People, 143 Ill. 571). You will note that it is said in the last case referred to that the witness **had a definite opinion of his own.** This is essenital. Although his opinion may be based entirely upon study and reading, yet as a result thereof he must have formed, and must, in fact, testify to **his own individual independent opinion.**

Thus, in People vs. Millard, 53 Mich. 63, Judge Campbell said:

"No one has any title to respect as an expert, or has any right to give an opinion upon the stand, unless as his own opinion; and if he has not given the subject such careful and discriminating study as has resulted in the formation of a definite opinion, he has no business to give it. Such an opinion can only be safely formed or expressed by persons who have made the scientific questions involved matters of definite and intelligent study, and who have, by such application, made up their own minds. In doing so, it is their business to resort to such aids, by reading and study, as they have reason to believe contain the information they need. This will naturally include the literature of the subject. But if they have only taken trouble enough to find, or suppose they find, that certain authors say certain things, without further satisfying themselves how reliable such statements are, their own opinions must be of very moderate value, and whether correct or incorrect, cannot be fortified before a jury by statements of what those authors hold on the subject. The jury are only concerned to know what the witness thinks, and what capacity and judgment he shows to make his opinion worthy of respect."3

But while it is settled law that an expert witness may testify as to his opinion derived entirely from his reading, yet medical books and excerpts from them are not admissible in evidence, though they be recognized standard authorities.4

The reason for the exclusion of such medical books is that the opinion of the authors, therein stated, were not written under oath, nor had the defendant any opportunity to cross-examine the learned writers, nor to ascertain whether their views may not have undergone any change since their articles were written.5

It is further settled that neither the books nor their contents can be brought before the jury indirectly; that is to say, the expert will not be permitted upon the stand to testify to what certain standard author-

3. Hoffman vs. Click, 77 N. C. 55.
State vs. Baldwin, 36 Kansas.

4. See Tupper vs. Donald, 60 Miss. 460, where excerpts from Copeland's Medical Dictionary, referring to paralysis, were not admissible; and State vs. O'Brien, 7 R. I. 336, where Taylor's Medical Jurisprudence was excluded; and Boringer vs. Medicine Co., 9 Texas Civ. App. 284, where it was held that the United States Medical Dispensary was not admissible in evidence, to establish a fact there contained. See also Hoffman vs. Click, 77 N. C. 55; and State vs. Baldwin, 36 Kansas 1.

5. See State vs. O'Brien, 7 R. I. 336; Pahl vs. Rwy. 81 N. Y. Supp. 46.

ities contain or say, nor to read excerpts from them. The expert may, however, give the names of such standard authors as he has read, and upon whose writings he has formed his own opinion in whole or in part.6

It is still further settled that counsel cannot get the excerpts from medical books indirectly before the jury by reading the same to his expert in his examination in chief, and asking him whether he agrees with such excerpt or the opinions therein given.7

In Mason vs. Hicks, 60 Hun. 46, where such course was pursued in the court below, the appellate tribunal, reversing, said:

"The effect of these rulings (in the court below) was to bring before the jury the unverified statements of the authors of the books read, and would tend to improperly influence a jury in the determination of the question before them. Medical books cannot be introduced in evidence, nor can expert witnesses be permitted to testify to statements made therein; and it is equally improper to permit the reading of such books to the jury by counsel."

Upon **cross examination**, however, the general rule that a medical book or its contents is inadmissible in evidence is subject to this exception, that if the witness in his examination in chief should assert that his opinion is based upon or is in accord with a work of a particular author, that work or an appropriate excerpt therefrom may be put in evidence with a view to contradicting them.8

Again, while there is some conflict of authority, the better opinion, in my judgment, is that a medical expert may be **cross-examined** generally upon the views and opinions expressed in standard medical works for the purpose of testing and ascertaining his knowledge and competency as an expert, and this irrespective of the fact that he may not have referred to them in his examination in chief.

Moreover, for the purpose of contradicting and discrediting the witness, extracts from medical works which are in **conflict** with the views expressed by him in his examination in chief may be read to him, and the question put whether he subcsribes to the same.9

In Fisher vs. R. R. Co., 89 Cal. 339, the Court said:

"The value of an effective cross-examination as a means of showing the incompetency of a witness, or the lack of integrity and the true value of his testimony, can hardly be overrated. *o o o o* While it is to be regretted that if in the proper exercise of the right of cross-examination it shall appear that certain medical writers of repute

6. See Rogers on Expert Testimony, 2 Ed. Pa. 177, p. 409; State vs. Baldwin. 36 Kansas 1.
7. See Pahl vs. Ry. Co. 81 N. Y. Supp. 46; Comm. vs. Sturtevant, 117 Mass., 122; Rogers on Expert Testimony 178, p. 410.
8. See Bloomington vs. Schrach, 110 Ill. 219.
9. See Egan vs. Railroad Co. 12 Appellate Div. (N. Y.), 556; Hutchinson vs. State; 19 Neb. 268; Fishes vs. R. R. Co., 89 Cal. 339.

differ from the witness, and so a party will get the benefit of unsworn testimony, still this evil, unavoidable in the nature of things, is in my opinion not at all commensurate with that which would deprive the party in such a case of the best touch-stone known to legal science by which to estimate the value of the testimony."

The Court accordingly held that within strict limitations such cross-examination was admissible; but it was further ruled that counsel will not be permitted under the guise of cross-examination to read excerpts from medical works not in contradiction of the expert's evidence in chief for the purpose of sustaining the cross-examining counsel's theory of the case.

DEMEANOR OF WITNESS.

Reference has already been made to Dr. Taylor's and Dr. Reese's suggestions as to the manner or deportment of the expert while giving his testimony. To this should perhaps only be added the further observation that he should avoid all appearance of pedantry and pomposity.

If for lack of knowledge or other reason he is unable to answer any questions, he should frankly say so. Some experts seem to think that to confess they have not read a paper or treatise of this or that author, or are unfamiliar with his views or opinions, is an admission of ignorance which is discrediting. Better far, however, make such admission frankly than to claim such familiarity and have it demonstrated in the next few questions that the statement is unwarranted.

Wellman, in his book on the art of cross-examination, relates an amusing incident. In the trial of a railway accident suit, a medical expert for the plaintiff was asked whether he could give the name of any medical authority that agreed with him as to the particular group of symptoms existing in the case being tried, which was one of alleged spinal trouble. The defense averred that such alleged injury was purely "hysterical," and existed in the patient's mind alone. To the aforementioned question as to whether any medical authority argeed with his views, the expert replied:

Doctor—Oh, yes, Dr. Ericson agrees with me.

Counsel—Who is Dr. Ericson, if you please?

Doctor—(with a patronizing air)—Well, Mr. Ericson was probably one of the most famous surgeons that England has ever produced.

Counsel—What book has he written?

Doctor (still smiling)—He has written a book called "Ericson on the Spine," which is altogehter the best known work on the subject.

Counsel—When was this book published?

Doctor—About ten years ago.

Counsel—Well, how is it that a man whose time is so much occupied as you have told us yours is has leisure to look up medical authorities to see if they agree with him?

Doctor (fairly beaming on counsel)—Well, Mr. ———, to tell you the truth, I have often heard of you, and I half expected you would ask me some such foolish questions, so this morning, after my breakfast, and before starting for court, I took down from my library my copy of Ericson's book, and found that he agreed entirely with my diagnosis of this case.

Counsel (reaching under the counsel table and taking up his own copy of "Ericson on the Spine," and walking deliberately up to the witness)—Won't you be good enough to point out to me where Ericson adopts your view in this case?

Doctor (embarrassed)—Oh, I can't do it now; it is a very thick book.

Counsel (still holding out the book to the witness)—But you forget, doctor, that thinking I might ask you some such foolish question, you examined your volume of Ericson this very morning after breakfast and before coming to court.

Doctor (becoming more embarrassed and still refusing to take the book)—I have not time to do it now.

Counsel—Time! why there is all the time in the world.

Counsel and witness eye each other closely.

Counsel (sitting down, still eyeing witness)—I am sure the court will allow me to suspend my examination until you shall have had time to turn to the place you read this morning in this book, and can read it out loud to the jury.

Suffice it to say that the doctor left the witness stand very much embarrassed, and the result was that the plaintiff failed to get a verdict.

Somewhat similarly in one of the pure food prosecutions, an expert for the defense who was endeavoring to impress the jury with his superior qualifications and wide reading of the literature upon the subject, was asked in the course of his cross-examination whether he had read the papers of half a dozen German and French investigators, whose names the District Attorney was able to read off, because they were mentioned in a paragraph of an essay on the subject which he had before him. The witness quickly replied in the affirmative. Another question or two was put to him, and then he was quietly asked to repeat the names of these German and French investigators, whose papers he had just said he had read. In evident embarrassment he mentioned the name of one of them, stumbled over and misquoted the name of a second, and was entirely unable to repeat the names of the others. The jury probably inferred that his forgetfullness was due to the fact that he had never read their papers.

TRUE EXPERT NOT A PARTISAN.

I cannot close this paper without emphasizing the fact that many experts in our courts today apparently entirely forget their true function and duty, which is, or at least should be, that of an impartial

teacher and adviser of the court and jury, and not that of an advocate and partisan. The place in court for the medical advocate is by the side of counsel, not in the witness box. Unfortunately, however, the average medical expert is so regarded by judge, jury, lawyers, spectators, newspapers and the public alike. What is worse, moreover, the general conviction is that the opinion of such an expert, though given under oath, is purchasable. I mean by this that it is my belief that the conviction is daily becoming more deeply seated in the community that the professional opinion of the medical man who appears as an expert runs with his fee.

"How often," says a learned member of your profession, in a recently published paper in which he animadverts upon this growing evil, "do we read in great headlines of the 'Battle of the Experts?' How often is the speculation heard privately or publicly as to whether the prosecution or defense will get 'Doctor A,' with the implication that the other side will necessarily get 'Doctor B,' and that 'Doctor A' and 'Doctor B' will of equal necessity express in court opposite opinions on the same facts."

Now, all this is lamentable. It does not help, but hinders, in the administration of justice, and is injuring the reputation and standing of your high and noble profession. The remedy is not, as some have suggested, in the appointment of a commission or board of state experts, for social and political considerations would necessarily influence and control the selection of such a board. In truth, as pointed out by the learned writer above referred to, "the true remedy for the difficulty is in our own hands."

Let me then adjure you and your great institution to bring the weight of your influence to bear in the reformation and eradication of this abuse.

Set your faces against it, frown it down, stamp it out. Be true to your traditions, your own exalted standards of duty and honor. Do not prostitute to lucre the noblest profession among men, for such it has ever been esteemed; never mercenary, but actuated by a high and lofty courage and splendid altruism, which in the simple discharge of professional duty has thousands and tens of thousands of times unhesitatingly braved and met death and martyrdom.

It is to the lawyers that the English-speaking people must chiefly ascribe their victories in their great struggles for constitutional liberty. But our profession contains no such galaxy of sainted heroes—everlasting benefactors of the world and of all mankind, as Harvey, Jenner and Lister; Pasteur, Koch and Bernard; Helmholtz, Virchow and Finsen; Wundt, Charcot and Maudsley; Ray, Simpson, Morton, McDowell and Leidy.

May you in your acts, deeds and lofty ideals ever be inspired by these great exemplars.—Medico-Chirurgical Journal.

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DEFENSE CONTRACTS.

We have frequently in these columns called attention to the necessity for defense against malpractice suits and have stated that the only satisfactory protection is a contract which gives defense without compromise. The contracts sold by insurance companies are not satisfactory, as they settle the case the cheapest way and the doctor's reputation has not been upheld but is injured permanently. A number of malpractice suits in Wisconsin have been poorly handled and judgments obtained against physicians in excess of the insurance. Contracts agreeing to pay judgment to a certain amount only encourage litigation. The jury is informed that the doctor is insured in a wealthy corporation which will pay the judgment, sympathy is excited for the plaintiff and the usual result is a judgment two or three times the amount of the contract. Every malpractice suit won encourages more such suits to the detriment of the whole profession. Wisconsin has recently had a number of such suits, which were lost because not properly defended. Any physician, no matter how small or how large his practice, is liable to have a malpractice suit at any time.

The only defense which we consider of any value is the contract made by the Physicians Defense Company, of Fort Wayne, Indiana.

This company agree to expend, if necessary, $5,000 in the defense of any one suit but does not pay a cent for damages. Physicians usually do their best for their patients and it is very seldom that there is any good cause for a malpractice suit. The profession should support the Physicians Defense Company which is successfully fighting its battles. We do not make these statements to advertise the company, but because they are facts. The profession is confronted with a great evil which threatens to take away hard earned savings. If the evil is properly met it will be downed, if not it will grow with startling rapidity. —Wisconsin Medical Recorder.

SUIT FOR MALPRACTICE.

The following clipping from the Palo-Pinto Star, of Texas, will be of interest to Dr. Braswell's friends throughout the country:

"The most interesting case tried last week was that of A. W. Watts vs. Dr. R. O. Braswell et al., being a suit for damages for $8,310 for malpractice in setting a broken arm. In this case the plaintiff totally failed to make out a case, and the court (jury having been waived) rendered a verdict for the defendants. Upon this trial it was shown that Dr. Braswell was an accurate and skilled surgeon, and that had plaintiff conformed to the instructions of his attending physician he would have had no trouble with the broken limb. Instead of damaging the doctor, it demonstrated his ability as a surgeon. The plaintiff was ably repsesented by Messrs. Bradford and Newbrough, while the interests of the defense were ably looked after by McConnell, Percy Smith and J. C. Houts."

The doctor and others, all of them liable to such suits, should be protected by a policy in the Physicians Defense Company, of Fort Wayne, Indiana. See their ad in our pages. We carry one and believe it to be the best form of protection for the practitioner.—(Ed.) Physio-Medical Record.

MARRIAGE AND INFECTIOUS DISEASE.

A young woman in the State of Washington sued a man for breach of promise of marriage. In his answer he confessed the promise, and averred that he would have married the woman had he not discovered after it was made, that she had tuberculosis. The court held that, if tuberculosis is an infectious disease, transmissible from parent to offspring, it is against public policy that a person suffering from tuberculosis should be married, and that nobody should have to pay damages for breaking a promise to marry such a person. This is a case in which the State must be cruel to some individuals in order to be kind to the majority. In self-defense, it should prohibit such marriages.—Everybody's Magazine.

Judicial Decisions.

Under this heading will be presented each month information relative to judicial decisions affecting the medical profession.

"IMMEDIATE" DISABILITY, CONSTRUCTION OF TERM.

The Supreme Court of Kansas, 80 Pac. 1020, holds, in Order of United Commercial Travelers of America vs. Barnes, that, as applied to a contract indemnifying a person, in case of accident, for injury sustained by violent means which should "independently of all other causes, immediately, wholly, and continuously prevent him from the prosecution of any and every kind of business pertaining to his occupation" the word "immediately" is not snyonymous with "instantly" "at once" and "without delay." A disability is immediate, within the meaning of such contracts, when it follows directly from an accidental hurt, within such time as the processes of nature consume in bringing the person affected to a state of total incapacity to prosecute every kind of business pertaining to his oecupation.

COMPANY NOT LIABLE FOR SERVICES.

J. H. Mohlman vs. American Grocery Company, 60 Atl. Rep. 950, is a recent New Jersey case in which a boy in the employ of the above company, while at work in the stable, was kicked in the jaw by a horse, receiving a severe injury. Another employee of the company immediately took the boy to a doctor's office, telling the doctor that the company would pay for his services in the matter. During the course of the treatment it became necessary, in the judgment of the doctor, to have a intradental plate made for the boy. This work required the services of an expert dentist and the physician so advised an employee of the company who accompanied the boy on his visits to the physician This employee directed him to the company's cashier who in turn directed him to the Fidelity and Casualty Company which had insured the grocery company against liability for accidents to employes. The doctor called up the casualty company on the telephone and was informed by the agent to wait until they could investigate the case, and until the casualty company had done so any expense incurred would be at the doctor's risk. The doctor evidently became disgusted with

this procedure as there is no further evidence of any communication relative to the matter.

Upon these facts the court held: "That the fact that the manager did not deny responsibility on the part of the corporation for the medical treatment rendered, and that he referred the physician to the casualty company, was not a ratification of the physician's employment and the corporation was not liable to him.

PARENT LIABLE FOR SERVICES TO ADULT SON.

Where defendant contracted with a physician to perform an operation on her son, who, though of age, was a member of the family, and had nothing to do with the matter, except to submit to the operation and it appeared that the property of the defendant and her sons was derived from the defendant's deceased husband, that it never had been divided, and that it was customary in the family to charge any bills that should be paid for the benefit of either to the share of the income belonging to such one, defendant was liable for the physician's services.

The doctor's witnesses testified that $500.00, charged in this case, was not excessive, but the only evidence as to the ordinary and reasonable value of the operation was that given by a witness for defendant, whose testimony was that the price of the operation performed in the city in question would range from $200.00 to $300.00, the physician was only entitled to recover $300.00 therefor.

PRIVILEGED COMMUNICATION WAIVED.

In Western Travelers Association vs. Munson, 103 N. W., Nebraska, 688, it was held that the prohibitions in the State Code of Laws against a physician testifying to confinedtial disclosures, are for the benefit of the patient, who, under the Code, can waive them. It is not necessary that such waiver be made at the time of the trial. It may be included in and made a part of the contract sought to be enforced in the action in which such testimony is offered.

A stipulation in a life insurance policy that the proofs of death shall consist in part of the affidavit of the attending physician, stating cause of death and other circumstances relative to the same, constitutes a wiaver and renders the attending physician a competent witness.

The common law protects the patient against the voluntary disclosure of such facts, and the statute protects him against the involuntary disclosures by his physician. But where the patient himself not only consents, but expressly stipulates that such disclosure be made in order to give force and effect to his contract, it would be a harsh and unwarranted application of a salutary rule to hold that the plaintiff could not avail herself of such stipulation for the enforcement of the contract made for her benefit.

NEGLIGENCE OF EXPERTS.

The Supreme Court of the United States says, Oceanic Steam Navigation Co. vs. Aitken, that it is true that negligence must be determined on the facts as they appeared at the time, and not by a judgment from actual consequences which then were not to be apprehended by a prudent and competent man. This principle nowhere has been more fully recognized than by this court. But it is a mistake to say that if the man on the spot, even an expert, does what his judgment approves, he can not be found negligent. The standard of conduct, whether left to the jury or laid down by the court, is an external standard, and takes no account of the personal equation of the man concerned. The notion that it "should be co-extensive with the judgment of each individual," was exploded, if it needed exploding, by Chief Justice Tindal, in Vaughan vs. Menlove, 3 Bing. N. C. 468, 475. And since then, at least, there should have been no doubt about the law.—J. A. M. A.

MAY SHOW REFUSAL TO SUBMIT TO EXAMINATION.

The Court of Civil Appeals of Texas says, in Houston Electric Co. vs. Lawson, a personal injury case brought by the latter party as next friend for his minor son, that on the trial the company offered to prove that it had made a motion to have the court appoint a committee of physicians to examine the child to ascertain the extent of its injuries, and that the plaintiff would not agree to the granting of said motion. The plaintiff objected to this proof being made, and the objection was sustained. The court thinks it clear that it was error to exclude this evidence. It says that the extent of the child's injuries and their reasonable probable effect on its future health were put in issue by the evidence. On these issues no testimony would be as satisfactory as the opinion of competent and disinterested physicians who had made a thorough examintaion of the child. This source of information was closed by the refusal of the plaintiff to submit to an examination and the want of power in the court to compel such examination. When a plaintiff in a case of this character refuses to submit to an examination, the fact of such refusal is a circumstance tending to discredit his claim as to the extent of his injuries, and is admissible in evidence for that purpose. Of course, there might in many cases of personal injury be reasons for a refusal by the plaintiff to submit to an examination which would greatly weaken, if not wholly destroy, the effect of such refusal as evidence; but the refusal, and the reason, if any, given therefore by the plaintiff, are facts to go to the jury, and must be weighed by them.—J. A.. M. A.

ABSENT TREATMENT AND THE UNITED STATES POSTAL LAW.

The United States Circuit Court of Appeals, Fifth Circuit, reverses and remands for a new trial the case of Post vs. United States, as it is now entitled, the district court decision of which was reported on page 1659 of The Journal, June 18, 1904. There were four indictments under the United States statute which provides, in substance, that if any person, having devised or intended to devise any scheme or artifice to defraud, to be effected by either opening or intending to open correspondence through the United States mail, shall, in and for executing such scheme or artifice, or attempting to do so, place or cause to be placed any letter, etc., in any postoffice of the United States, such person shall, on conviction, be punished, etc. The gist of the scheme or artifice charged in each of the first three indictments was that the accused in this case advertised to practice mental healing, and received pay to treat patients "when she did not intend to administer any treatment." The court says that the evidence not tending to sustain the charge that she did not intend to administer the advertised treatment for which she was paid, a verdict of not guilty should have been directed on these indictments. If the accused intended to administer and did administer the treatment she advertised, she was not guilty of the fraud charged, although the treatment might be in fact valueless. The mere allegation that she was engaged in the business of mental healing was not an allegation of a "scheme or artifice to defraud."

In the fourth instruction there was a distinct charge that the representations made by the accused as to her ability to cure, etc., were false, and were well known to ber to be false; that her promised treatment was ineffectual for the cure of any disease. It did not present a question of the lawfulness of the calling of a mental healer, or whether or not mental science is a fraud and humbug, but it presented the question of the good faith of the accused. The case, the court says, should be tried with the distinct understanding that the practice of mental healing is, in federal law, as lawful as healing with drugs. The question involved her belief in her representations and promises. While her belief was not the subject of direct proof, it might be ascertained from circumstances and by the proof of her actions and declarations. If her method of treatment was as baseless as mundane astrology, it made no difference, if the accused believed in it and practiced it in good faith and without positive intention to defraud. If, without belief in her professions or proposed treatment, and with knowledge that her representations were false, she made them to defraud, the fact that mental healing is a lawful vocation did not protect her.

In a criminal trial, where the defendant's only plea is "Not guilty," the general rule is unquestioned that the burden of proof, and the

obligation to convince the jury of the prisoner's guilt beyond a reasonable doubt, as to all essential matters, including the criminal intent, is on the prosecution throughout the trial. This being the law, it was error, the court thinks, to instruct the jury, in any aspect of the case, that the burden of proof rested on the accused to satisfy the jury that she possessed the power to cure diseases, as claimed, and that her contention must be satisfactorily proved. It was one of the affirmative averments of the indictment that the representations made by the accused were false and not capable of performance by her, and the burden was on the United States to prove it.

Another point that the court makes is that, under the practice of the federal courts, the judge may express his opinion as to the weight or effect of evidence or the credibility of witnesses; but, if evidence is admitted as, and is, legal and relevant, the jury should not be peremptorily directed to ignore it. The court says that it is not holding that the accused had a right to embark in a business, and to insist that its illegality should be tested by principles beyond the understanding of others, and not by such knowledge as the courts and juries possess. The case must, of course, be tried and tested by the rules of law and by common human understanding. But when a question of fact is tested, although it may involve the existence of a power not generally recognized, evidence bearing on the question must be considered as in other cases. Science has not yet drawn, and probably never will draw, a continuous and permanent line between the possible and impossible, the knowable and unknowable. Such line may appear to be drawn in one decade, but it is removed in the next, and encroaches on what was the domain of the impossible and unknowable. Advance in the use of electricity, and experiments in telepathy, hypnotism and clairvoyance, warn us against dogmatism. The experience of the judiciary, as shown by history, should teach tolerance and humility, when we recall that the bench once accounted for familiar physical and mental conditions by witchcraft, and that, too, at the expense of the lives of innocent men and women. In that day, it was said from the bench that to deny the existence of witchcraft was to deny the Christian religion. Juries would have done better. Then and now questions of fact were best tried by jury.

Finally, the court says, that in dealing with the issues raised by the record, it did not intend to express any opinion as to the substantiality of mental science, or whether it is founded on some occult natural law or on mere parade and mummery. The court is not a society for physical research, charged with the duty of forming and announcing opinions on that subject. It endeavored only to make it plain that there was nothing in this case to require a departure from the ordinary rules of evidence and familiar criminal procedure.—J. A. M. A.

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I hereby apply to the

Physicians Defense Company

Fort Wayne, Indiana

For a Defense Contract for *Medical and Surgical and Dental Services, and I understand and agree that said Contract shall be based upon the following statement of facts and agreements; and that the Company shall not be bound by statements made by any agent or broker not written or printed herein.

My full name is_____ **Office No**_____ **St.**

City of_____ **County of**_____ **State of**_____

If connected with a firm, the style is_____

I graduated from the_____ **in the year**_____

I practice under the_____ **School of Medicine; and have been duly Registered and Licensed to practice**

in this county, under the Laws of this State. Certificate No_____ **from the**_____

I agree that this contract shall not cover suits for damages in which services were rendered while under the influence of liquors or drugs.

I agree to notify the Company at once by telegraph or telephone when demand is made, or suit commenced for damages, and will not make nor contract any expense without the written authorization of the Company, and will contribute my own time and assistance in defense of the case without charge to the Company.

I warrant each and all of the statements made herein to be true and complete. I also warrant that this application has been made and written by myself or duly authorized agent and that I understand its provisions

Date_____ **190...** **(Applicant's Signature)**_____

*** Cross out professions not practiced.**

Received H. O. *Issued*

CAPITAL STOCK $100,000 NUMBER INCORPORATED UNDER THE LAWS OF INDIANA

The Physicians Defense Company

FORT WAYNE, INDIANA

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In Consideration of the written and printed application, which is hereby made a part of this contract, and the sum of Fifteen Dollars, receipt of which is hereby acknowledged, being the consideration for one year's defense, and the further payment of Fifteen Dollars annually in advance on the _____ day of _____ of each year during the life of this contract,

The Physicians Defense Company
(HEREINAFTER KNOWN AS COMPANY)

hereby agrees to defend the legally qualified Physician,

_____ of the City of _____, County of _____, State of _____ against all civil suits for damages for malpractice, based on professional services rendered by himself or his agent during the term of this contract, at its own expense, not exceeding FIVE THOUSAND DOLLARS in defense of any one suit, nor exceeding in the aggregate TEN THOUSAND DOLLARS in defense of suits based on services rendered by the holder hereof, within one year from the date of this contract, or within any one year for which this contract shall be renewed, all in the manner and upon the conditions herein below stated, to-wit:—

Immediate notice by telegram, must be given the company at the Home Office at Fort Wayne, Ind., of any suit brought or demand made; and the holder hereof shall immediately forward the summons, or other process served, and the complaint or petition filed; together with a full and complete history of the case and services rendered.

Upon receipt of notice from the holder hereof that a suit has been commenced against him for damages for civil malpractice, the company will employ a local attorney in whose selection the holder hereof shall have a voice, who, together with the company's attorney, will defend the case without expense to the holder hereof.

Such defense will be maintained until final judgment shall have been obtained in favor of the holder hereof, or until all remedies by appeal, writ of error or other legal proceedings shall have been exhausted, or until the sum of Five Thousand Dollars shall have been expended in said defense; provided said company shall not be under obligation to expend more than Ten Thousand Dollars in the aggregate in the defense of suits based on services rendered, by the holder hereof, during the original one year term or any renewed one year term of this contract.

Said company does not obligate itself to pay or to assume or to secure the payment of any judgment rendered against the holder hereof, in any suit defended by it.

The company shall not compromise any suit or claim for malpractice against the holder hereof. Nor shall the holder hereof, after the company has entered upon the defense of any such suit in behalf of the contract holder, compromise the same without the consent of the company in writing first thereto had, and by reimbursement of the company its expenses theretofore incurred.

No suit or claim will be defended by this company, under this contract, in which the cause of action arose previous to the date of this contract.

This contract does not cover criminal prosecutions nor suits for assault, criminal abortion, foeticide, homicide or other criminal act, or actions arising by way of counter-claim or recoupment.

The company may cancel at any time the unexpired portion of this contract upon written notice mailed to the holder hereof, and the unearned portion of the consideration therefor shall be returned to the holder hereof.

This contract does not take effect until the consideration therefor shall have actually been paid to the company or its authorized agent; but if the holder shall have paid such consideration and shall have received from the company or its duly authorized agent a memorandum certifying such payment and that the contract is to be subsequently delivered, then this contract shall be dated as of the date of such payment and shall be in force and effect from that date.

This contract shall not lapse at the end of the time as stated above if the holder hereof shall pay the annual consideration in advance at the Home Office in Fort Wayne, Ind., or to an authorized agent of the company, in exchange for the company's receipt, signed by the president and secretary and countersigned by the agent, but shall continue in force for the term or terms for which such annual consideration shall be paid; provided, however, that the liability of the company under such extension shall not be cumulative.

No consideration or agreement contained in this contract, or application for same, can be waived or altered in any manner by any person, other than the president or secretary, in writing endorsed hereon.

In Witness Whereof, The Physicians Defense Company has caused this contract to be signed by its president and secretary and its official seal attached hereto in Fort Wayne, Indiana, this _____ day of _____ 190__.

FORM I

Miles F. Porter
President.

E. H. Merritt
Secretary.

Medico-Legal Bulletin.

WHY QUACKERY THRIVES.

Reynold Webb Wilcox, M. D., LL. D., New York.
Professor of Medicine at the New York Post-Graduate Medical School and Hospital; Physician to St. Mark's Hospital.

In the presence of distinguished members of the legal profession, I presume that I should be asked to prove the affirmative of the proposition suggested by my title. By those who have heard the counsel of the Medical Society of the County of New York, either before this society, or the county society, no proof is necessary; quackery does thrive.

It behooves us then, as practitioners of two professions, about which the law has placed restrictions, and upon which it has imposed regulations, ostensibly for the protection of the people, to inquire why these restrictions and regulations are not more potent, and, in fact, are becoming less and less potent, with each succeeding year. During the many years in which I have had to do with professional legislation, I can recall no instance of failure on the part of the legislature, to enact laws or to bury bills in committee, bearing on medical legislation, provided it could be shown to the legislators that the profession was harmonious upon the subject, and really desired either affirmative or adverse action. With the legal profession always better represented in legislative bodies than the medical, the same statement is doubtless even more true. We have had nearly a century of medical legislation, we have had the earnest, loyal support of the two schools based on well-defined principles, although, as we believe, not sufficiently broad, and we have today a standard of admission to the legitimate practice of medicine which is respectable, and yet not sufficiently rigorous as to exclude any person of moderate education, means or ability, if coupled with industry, from becoming a physician, entitled to practice in the State. There never has been a time in the history of the world, when scientific medicine and surgery has been more effective in alleviating suffering and curing disease, than the present. There has never been a time when the healing art-science has attracted to it more brilliant intellects and more thorough training than today. There never has been a time when the actualities

and possibilities even of medicine were greater than they are today. The triumphs of medicine and surgery are startling, even to the profession.

The results of modern medicine are demonstrable even to the most heedless of the unlearned. The educated and ignorant alike recognize that these brilliant successes have been brought about by trained scientific workers in the profession itself and are not the result of chance or of intuition or of supernatural agencies. And yet quackery thrives!

The legal profession has always been in touch with law-making bodies. Its opportunities for guarding the entrance to it have been great, and wisely employed. The regulations of a lawyer's conduct are distinct and equitable; his practice lies within well-defined boundaries. If there is transgression, within the profession is to be found the knowledge and method whereby the transgressor may be rewarded. He is a sworn officer of the court. Yet a limited experience in courts has developed these facts. A prisoner may be paroled in custody of "counsel," and that counsel may not only not be a member of the bar, but may even be a disbarred lawyer. A member of the bar may, for the purpose of bringing a disinterested witness into discredit with the court, obtain, by perjury and fraud an order which it is physically impossible to obey. When rebuked by the court he may prate before the jury of his deep solicitude "that his honor shall be untarnished" without hindrance. Or the attorney, seeking to establish a post-mortem, will, may, in conducting the cross-examination of an expert, descend to the lowest depths of a pettifogger or shyster before a judge whose election he has been currently supposed to have compassed Or causes may be prosecuted in such a manner that it is perfectly apparent to all present that they are conducted with a hope to contingent fees and based upon an agreement which is an absolute fraud upon his client. And the means by which these clients are persuaded into litigation are so well known, that no attention is paid to them. Of what value the committee on grievances of the bar association is, may be inferred when the State Bar Association strains at the gnat of presumably reputable lawyers accepting retainers in notorious actions, but swallows the camel of practices which involve not only the honor, but even the usefulness of the Supreme Court of the State.

Of the illegitimate use of legal knowledge, one may cite the work of certain members of the bar in establishing a department, at the yearly cost to the city of a third of a million of dollars, for the benefit of a professional philanthropist for spoils and a professional blackmailer and with possibilities of blackmail, with difficulty computable. When these individuals were summarily retired to private life, one of them by means of information obtained buring his short tenure of office and with the aid of a quasi-political organization still continues his

nefarious practices. Nor indeed, need we more than allude to the interest which a Supreme Court judge may have in aiding a man with a police record in establishing a dive in a residential portion of the city, in defiance of law. It may well be questioned what utility the local bar association may possess.

In the medical profession, we are supposed to be actuated by high principles of humanity. The secondary consideration is assigned to be the earning of a respectable livelihood. The problems of increased cost of preparation, and the securing of an adequate return for preparation and experience, have brought matters upon a basis at times hardly altruistic. The code has been invoked as a sort of moral guide for those whose earlier education had been neglected, and the various societies have attempted to force goodness by rule. The laws were for the betterment of the profession, and the societies were for the interpretation of these rules of conduct. Under these conditions the result was not far to seek. Those who had most to fear from a decent interpretation of what constitutes professional right-living, at once sought to control the societies. Owing to the disinclination of the average physician to interest himself in medical politics, we have the spectacle of a person whose practical knowledge of ethics was acquired behind prison bars, and who has been alleged to be in close touch with the press, gathering about him kindred spirits until his cabal obtains absolute control of a large medical society for mutual protection against attack upon their wrong-doing. It is needless to say that the executive head of the society is generally a man of position, but utterly powerless to withstand the cohesive forces of evil. Personal ambition of otherwise reputable men, is made use for the furtherance of their nefarious plans. When this condition is reached, a combined assault of the respectable men in the organization is needed, but that is rarely undertaken. The easier method is the organization of a new body as a protest. That this is practicable, has been demonstrated, at least, three times in the medical history of the city. That the majority of medical men favor right-doing, is shown by the growth of a society to 650 members within five years—membership in which demands honorable record for admission, and that no improper practice will be allowed during the time of their membership.

Advertising is held to be improper, yet type-written reports of wonderful operations accompanied by a cheque, do sometimes find their way into newspaper offices. An editor once said that the only difference between the advertising of a supposedly reputable physician and the professional quack, was that the former obtained more space for his money. An analysis of the names discloses considerable repetition. Of the names which appear but once during a decade, the presumption may be that the physician may not be at fault. If there

are a large number of appearances of the same man, the presumption is that some of the advertisements may be inspired. The most brazen offenders are well organized and resent any intrusion, even if only apparent, into their trust. The vigorous discussion of accidental offenses, usually brings out an enunciation of professional ethics as viewed by those whose conduct least entitles them to be considered authority.

Then, instances like the following arise: A specialist may ignore the significance of albumin and casts in a pregnant woman; when labor unexpectedly to him supervenes, he may attempt to put obstetrical forceps on the head of a six and one-half months' fetus; without ascertaining if he has engaged the head, he may endeavor to extract, with the result of tearing the unfortunate woman to the sphincter ani muscle. Then he may seek to repair the injury with infected catgut sutures, with the result that the child's life is sacrificed, and the mother barely escapes death, with a long and tedious convalescence before her. If this is not arrant quackery, and criminal malpractice, there never has been any. Yet the scoundrel may continue to practice, because, forsooth, no physician wishes to interfere with the work of another; he may even retain his teaching position because he did not commit this act within the building and the school, or he may even practice in a hospital because patients generally survive his work, and finally, he may not even fear a suit for damages on the ground of malpractice because he is a member of a medical society which defends its members against suits of that nature. Subsequent investigation developed the fact that this particular shining medical light had been addicted to the use of chloral for some years, and more recently, had become an habitual drunkard.

That drug habitation is, by no means, uncommon in medical practitioners, is evident, if one reads the writings of men who see large numbers of such cases, as for instance, Mattison. And yet the society ignores these facts, but busies itself in regard to what type one's name may appear in directories other than medical.

Another matter which has attracted considerable attention has been the increase in the number of so-called "private hospitals" and "sanitariums." Many of these are conducted properly, and with due regard to professional honor, others are merely boarding houses, imperfectly equipped for proper care of patients, while some are used for purposes which are better unnamed.

That many physicians have their notions of professional integrity shaken during their earlier professional career, is evident. Their engaging in various occupations, under salary, during the time that they are waiting for a remunerative practice, life insurance, board of health, detail work, undoubtedly has much to do with their subsequent conduct. That there is sometimes a close relationship between

certain life insurance employees and quack doctor shops, was brought out during a recent investigation before the grand jury.

Presumably some patients consult quacks because they believe that they are sure to find specialists, having learned from experience that sometimes legitimate specialists attend patients not coming under their supposed classification.

From what has been said, it is evident that there is quackery both in and out of the regular medical profession. The connecting link seems to be that a regularly qualified practitioner may be employed on a salary by an advertising quack without detriment to his standing in a medical society.

Quackery undoubtedly thrives because of the commercialism of the age. It thrives because of the fierce struggle for livelihood which bears hardest upon inferior and poorly-equipped practitioners. It also thrives because of the lowered professional sense of honor brought about by the control of men whose greed has smothered their sense of right and justice.

The remedy of remedies for a condition brought about by the complexities of our modern life are difficult to firmly establish. Among them, I would suggest, (1) prohibition by law of medical advertisements, which are almost without exception, untrustworthy, many of them fraudulent, some obscene, and others immoral. Even the weekly medical journal which arrogates to itself the censorship of the American medical morals, published last year an advertisement of an instrument for the production of abortion! When supposedly reputable medical journals lapse, can the lay press be blamed for lack of discrimination?

This would minimize the depradations of the advertising quack, and limit the supposedly legitimate physician, who desires to become noted, with undue rapidity. Although the law interfered with divorce lawyers' advertisements, it is doubtful if legislation could be secured against medical advertising, because of the revenue which it produces. If such laws could be passed, it is estimated that one-third of all periodicals would be obliged to discontinue. It might possibly be reached by holding the press responsible for damages resulting from their advertisements.

(2) The persistent advertisers in the profession should be expelled from those societies charged with police duties. Common honesty demands that those who pose as specialists should limit themselves to their specialty.

(3) Drug-fiends, habitual drunkards, professional wrong-doers should be, by law, disbarred from practice. In other words, not only should a man's knowledge and character attain a certain standard when he becomes a legalized practitioner of medicine, but he should be compelled to maintain that standard or be prevented from practice.

(4) Medical societies should not allow persons to become members

or retain as members those who are engaged in commercial pursuits, or occupied salaried positions.

(5) There should be no interference with those of sound mind and adult years, who wish to embark in any scheme which is not unsafe for the State, or violates the rights of others. The various metaphysical systems are well equipped and of sufficient variety to care for all who prefer the occult and mysterious, the wonderful and incredible, and of these Christian Science is especially recommended for those to whom language was given for the confusion of their ideas.

The education of the people, and especially the sort in vogue at the present, will never stamp out quackery. It is a wise person who can learn from another's exeprience, and each one must learn for himself, that something can never be obtained for nothing. His own bitter experience must teach him that quackery is dear at any price. Before that he has learned his lesson, let him have opportunity to dabble in the comparatively harmless varieties.

Limiting the dissemination of fraudulent advertisements would be a most potent aid toward the abolition of quackery, but, as I have already said, it seems impracticable.

Driving the quacks from the medical societies would give the public a standard for comparison, and would elevate the moral tone of the whole profession.

Preventing drug-habitues, chronic drunkards and persons of notorious immoral lives from practicing medicine, would give the public a confidence in professional skill and science which they do not now possess.

It is possible that lectures to undergraduate medical students would lessen the number of those who fall into improper practices.

In fine, the most potent and practicable influence in limiting quackery, lies in the profession itself; to keep it clean and honorable, to show by deeds that which quacks claim in words, to rule by what becomes a gentleman, rather than to endeavor to make a gentleman by rule, to be honest, not only toward the people, but to be honest with ourselves.—Medical Fortnightly.

EXPERT MEDICAL TESTIMONY.

The subject of expert medical testimony continues to be discussed by lawyers and by physicains at their bar associations and medical society meetings, but as yet no one has been able to present a solution of the problem which is at all likely to do away with the evils which surround the whole question, and the shameful condition, which brings disrepute upon both professions in the eyes of the people at large, goes merrily on. An individual sues a corporation for large damages for personal injuries, and it is safe to prophesy that the number of physicians arrayed on each side of the case and prepared to express exactly opposite opinions concerning the nature of the planitiff's injuries will be about the same, and that they will all be men of good professional standing in the community; men, too, who, in nine cases

out of ten, would agree in their opinions were they called together in consultation over the case solely for the purpose of treatment and prognosis. Is a murder committed, and the question of insanity raised by the defense, it is safe to prophesy that the leading alienists in the community will be divided and opposed to each other on the witness stand, and that half of them will testify that the prisoner is insane, and the other half that the prisoner is not insane, according as they are retained by the accused or by the state. In such a case, also, the same men would probably agree if the examinations were made in the probate court instead of in a criminal case, and it is also a fair inference that the very same men would have testified on the other side of the same case had the other side retained them first.

Surely it is time that something should be done to change the legal methods which permit this disgraceful spectacle which is witnessed in almost every personal injury suit and every murder trial which hinges on the sanity of the accused. The problem is one which should be solved by lawyers and judges, but a solution suggests itself to us which would seem both simple and satisfactory—although we have not the slightest idea that it would meet the approval of lawyers.

Whenever a question arises in court where the truth can only be ascertained as the result of competent medical opinion, we would suggest that the matter be referred to a board of medical referees, consisting of three or five men selected by the presiding judge; these men should not be approached by the attorneys of either side, or allowed to testify in court at all. Let these men have all the facts placed before them, let them examine the plaintiff or the prisoner, as the case may be, and let them submit a signed and sworn-to statement of their findings and opinions, which shall be read to the jury. In nine cases out of ten the members of such a board would agree, and their opinion would be unanimous. In cases, which of course would sometimes arise, where they could not agree, a minority report might also be submitted to the jury, and if the judge was of the opinion that there was still a reasonable doubt, another board could be selected to pass upon the same question. The compensation of these medical referees should be included in the costs of the case.

We believe that all fair-minded men will agree that such a method of procedure would be much more likely to present a fair and just medical opinion to the judge and jury than the methods now practiced. Unfortunately, however, it is not the truth that is sought in the vast majority of these cases. The opposing lawyers are out to win their case, and not to ascertain the truth, and the present legal methods permit the widest license in the manner of presenting evidence which shall befog the minds of the jury, and conceal the truth. It frequently, indeed, usually happens, that the medical witness is not allowed to testify to what he knows or what he believes, but that he is required to answer a carefully prepared hypothetical question by "yes" or "no," and this question is often so worded that the answer must express an opinion directly opposite to the one actually held by the wwitness. The witness in such a case is helpelss, and although, perhaps, perfectly honest, he leaves the stand with the feeling that he has stulified himself. While there are, it must be admitted, dishonest men in our profession who will testify to anything desired if they are well paid for it, there are many honest men who are made to appear dishonest by the shrewd questions of an unscrupulous lawyer. We believe that the medical profession as a whole would welcome any method which would do away with the present conditions of expert testimony, and almost any change would be a change for the better.—THE ST. PAUL MEDICAL JOURNAL.

Medico-Legal Bulletin.

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THE MEDICO-LEGAL BULLETIN is issued on the first of each month, in the interests of the medical profession from a Medico-Legal standpoint, and will spare no endeavor to furnish valuable news and information relative to legislative enactments and judicial decisions affecting the profession. Communications on these subjects are solicited from all interested. Reprints of contributed original articles will be furnished, without charge, to authors making request.

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ADVERTISING RATES FURNISHED UPON APPLICATION. Non-ethical advertisements will not be received, the publishers reserving tne right to reject and discontinue any advertisement at any time.

TECHNICAL ASSAULT.

The case of Mohr v. Williams, recently decided by the Supreme Court of Minnesota and reported in 104 N. W. 12, a syllabus of which we print in this number of the Bulletin, is of exceptional interest both to the medical and legal profession.

The question involved is the liability of a physician for damages growing out of an operation performed without the patient's consent This is the second case decided by an Appellate Court involving this question, the other being Pratt v. Davis, decided by the Appellate Court of Illinois.

The question of what constitutes an operation without consent or a technical assault is a relative question depending upon the circumstances of the case, and is not at all well settled.

On the one hand the great responsibility imposed upon the medical profession to do its best in attempting to alleviate the suffering of its patients inclines one to the conclusion that a physician or surgeon in taking charge of a patient should be vested with almost absolute discretion as to the remedies he will apply for the purpose of accomplishing his ultimate ends. On the other hand we are presented with the fundamental theory of personal rights, so essential to the American theory of law. The person of every citizen is sacred to himself and any unauthorized touching or interfering with his person, not in the spirit of pleasantry, is, at least in theory, an assault.

In the April number, 1905, of the Medico-Legal Bulletin, there is an article discussing the question of technical assault and setting forth the cases applying to the same. As concluded in that article there is no doubt but that consent of the patient, either expressed or implied, is necessary to the justification of an operation. The difficult question is to determine when consent may be implied. It is evident that if a surgeon is called upon to amputate a patient's leg he cannot, under such authority, also remove his appendix. On the other hand it will be conceded that if a patient were found unconscious from the effects of a fractured skull, a surgeon called to dress the same could, if the necessity of the case warranted, remove a part of the skull, or set a broken arm incident to the same injury. The necessity of the case may be sufficient to imply the consent of the patient.

To draw the line too closely would certainly lead to absurd conclusions and work a great hardship to those needing medical care. On the other hand, to give a loose construction to what constitutes a consent would break down one of the most firmly established principles of personal liberty. That is, that every citized has the right to his person without interference from others.

The case above mentioned is very well considered and promises to be a safe precedent for the professions in the future.

During the last two years the action for technical assault has grown very popular among damage suit lawyers, and owing to the development of surgery the best of the profession are thrown open to indiscriminate attack. Reasonableness must be the basis of every decision in order to protect the interests of patients, as well as to encourage the integrity of the profession.

STATE MEDICAL BOARD RESTRAINED.

Exceeded Its Duties in Sending Out Agents to Obtain Evidence Against Doctors and Then Prosecuting Them.

INDIANAPOLIS, Aug. 21.

The Johnson Circuit Court, in a decision handed down today, granted a temporary injunction restraining the state board of medical registration and examination from trying Dr. John M. Rhodes on the charge of "gross immorality." The basis of this decision was that the board had exceeded its powers in hiring Eva Boykin and Walter McClelland to obtain evidence that certain physicians over the state would perform illegal operations, and then after obtaining such evidence, setting as a court to hear the case, thus combining the duties of prosecutor and judge.

Judicial Decisions.

Under this heading will be presented each month information relative to judicial decisions affecting the medical profession.

MOHR VS. WILLIAMS.

(No. 37 A. 104 N. W. Minn. 12.)

Defendant is a physician and surgeon of standing and character, making disorders of the ear a specialty, and having an extensive practice in the city of St. Paul. He was consulted by plaintiff, who complained to him of trouble with her right ear, and, at her request, made an examination of that organ for the purpose of ascertaining its condition. He also at the same time examined her left ear, but owing to foreign substances therein, was unable to make a full and complete diagnosis at that time. The examination of her right ear disclosed a large perforation in the lower portion of the drum membrane, and a large polyp in the middle ear, which indicated that some of the small bones of the middle ear (ossicles) were probably diseased. He informed plaintiff of the result of his examination, and advised an operation for the purpose of removing the poly and diseased ossicles. After consultation with her family physician, and one or two further consultations with defendant, plaintiff decided to submit to the operation. She was not informed that her left ear was in any way diseased, and understood that the necessity for an opertaion applied to her right ear only. She repaired to the hospital, and was placed under the influence of anesthetics; and, after being made unconscious, defendant made a thorough examination of her left ear, and found it in a more serious condition than her right one. A small perforation was discovered high up in the drum membrane, hooded, and with granulated edges, and the bone of the inner wall of the middle ear was diseased and dead. He called this discovery to the attention of Dr. Davis—plaintiff's family physician, who attended the operation at her request—who also examined the ear, and confirmed defendant in his diagnosis. Defendant also further examined the right ear, and found its condition less serious than expected, and finally concluded that the left, instead of the right, should be operated upon; devoting to the right ear other treatment. He then performed the operation of ossiculectomy on plaintiff's left ear, removing a portion of the inner

wall of the ear. The operation was in every way successfull and skillfully performed. It is claimed by plaintiff that operation greatly impaired her hearing, seriously injured her person, and, not having been consented to by her, was wrongful and unlawful, constituting an assault and battery; and she brought this action to recover damages therefor. The trial in the court below resulted in a verdict for plaintiff for $14,322. 50. Defendant thereafter moved the court for judgment notwithstanding the verdict, on the ground that on the evidence presented, plaintiff was not entitled to recover, or if that relief was denied, for a new trial on the ground, among others, that the verdict was excessive; appearing to have been given under the influence of passion and prejudice. The trial court denied the motion for judgment, but granted a new trial on the ground as stated in the order, that the damages were excessive. Defendant appealed from the order denying the motion for judgment and plaintiff appealed from the order granting a new trial. But in any case whether a new trial upon the ground of excessive or inadequate damages should be refused, or whether the verdict should be reduced, rests in the sound judicial discretion of the trial court. (Craig v. Cook, 28 Minn. 232, 9 N. W. 712; Pratt v. Pioneer press, 32 Minn. 217, 18 N. W. 836, 20 N. W. 87).

2. We come then to a consideration of the questions presented by defendant's appeal from the order denying his motion for judgment notwithstanding the verdict. It is contended that final judgment should be ordered in his favor for the following reasons; (a) That it appears from the evidence received on the trial that plaintiff consented to the operation on her left ear. (b) If the court shall find that no such consent was given, that, under the circumstances disclosed by the record, no consent was necessary. (c) That, under the facts disclosed an action for assault and battery will not lie; it appearing conclusively as counsel urge, that there is a total lack of evidence showing or tending to show malice or an evil intent on the part of defendant, or that the operation was negligently performed.

We shall consider first the question whether, under the circumstances shown in the record, the consent of plaintiff to the operation was necessary. If, under the particular facts of this case, such consent was unnecessary, no recovery can be had, for the evidence fairly shows that the operation complained of was skillfully performed and of a generally beneficial nature. But if the consent of plaintiff was necessary, then the further questions presented become important. This particular question is new in this state. At least, no case has been called to our attention wherein it has been discussed or decided, and very few cases are cited from other courts. We have given it very deliberate consideration, and are unable to concur with counsel for defendant in their contention that the consent of plaintiff was unnec-

essary. The evidence tends to show that, upon the first examination of plaintiff, defendant pronounced the left ear in good condition, and that at the time plaintiff repaired to the hospital to submit to the operation on her right ear, she was under the impression that no difficulty existed as to her left ear. In fact, she testified that she had not previously experienced any trouble with that organ. It cannot be doubted that ordinarily the patient must be consulted, and his consent given, before a physician may operate upon him. It was said in the case of Pratt v. Davis 37 Chicago Leg. News, 213, referred to and commented on in Cent. Law J. 452.

1. Kinkead on Torts Par. 375, states the general rule on this subject as follows: "The patient must be the final arbirer as to whether he will take his chances with the operation or take his chances of living without it. Such is the natural right of the individual, which the law recognize as a legal one. Consent, therefore, of an individual, must be expressly or impliedly given before a surgeon may have the right to operate." There is logic in the principle thus stated, for, in all other trades, professions or occupations, contracts are entered into by the mutual agreement of the parties interested, and are required to be performed in accordance with their letter and spirit. No reason occurs to us why the same ru'e should not apply between physician and patient. If the physician advises his patient to submit to a particular operation, and the patient weighs the dangers and risks incident to its performance, and finally consents, he thereby, in effect, enters into a contract authorizing the physician to operate to the extent of the consent given, but no further. It is not, however, contended by defendant that under ordinary circumstances consent is unnecessary, but that, under the particular circumstances of this case, consent was implied that it was an emergency case, such as to authorize the operation without express consent or permission. The medical profession has made signal progress in solving the problems of health and disease, and they may justly point with pride to the advancement made in supplementing nature and correcting deformities, and relieving pain and suffering. The physician impliedly contracts that he possesses and will exercise in the treatment of patients, skill and learning, and that he will exercise reasonable care and exert his best judgment to bring about favorable results. The methods of treatment are committed almost exclusively to his judgment, but we are aware of no rule or principle of law which would extend to him free license respecting surgical operations Reasonable latitude must, however, be allowed the physician, in a particular case; and we would not lay down any rule which would unreasonably interfere with the exercise of his discretion, or prevent him from taking such measures as his judgment dictated for the welfare of the patient in a case of emergency. If a person should be injured to the extent of rendering him unconscious,

and his injuries were of such a nature as to require prompt surgical attention, a physician called to attend him would be justified in applying such medical or surgical treatment as might reasonably be necessary for the preservation of his life or limb and consent on the part of the injured person would be implied. And again, if, in the course of an operation to which the patient consented the physician should discover conditions not anticipated before the operation was commenced, and which, if not removed, would endanger the life or health of the patient, he would, though no express consent was obtained or given, be justified in removing them. But such is not the case at bar. The diseased condition of plaintiff's left ear was not discovered in the course of an operation on the right, which was authorized, but upon an independent examination of that organ, made after the authorized operation was found necessary.

Nor is the evidence such as to justify the court in holding, as a matter of law, that it was such an affection as would result immediately in the serious injury of plaintiff, or such an emergency as to justify proceeding without her consent. She had experienced no particular difficulty with that ear, and the question as to when its diseased condition would become alarming or fatal, and whether there was an immediate necessity for an operation, were, under the evidence, questions of fact for the jury.

The contention of defendant that the operation was consented to by plaintiff is not sustained by the evidence. At least, the evidence was such as to take the question to the jury. This contention is based upon the fact that she was represented on the occasion by her family physician, that the condition of her left ear was made known to him, and the propriety of an operation thereon suggested, to which he made no objection. It is urged that by his conduct he consented to it, and that plaintiff was bound thereby. It is not claimed that he gave his express consent. It is not disputed but that the family physician of plaintiff was present on the occasion of the operation, and at her request. But the purpose of his presence was not that he was authorized to consent to any change in the one originally proposed to be made. Plaintiff was naturally nervous and fearful of the consequences of being placed under the influence of anesthetics, and the presence of her family physician was requested under the impression that it would allay and calm her fears. The evidence made the question one of fact for the jury to determine.

The last contention of defendant is that the act complained of did not amount to an assault and battery. This is based upon the theory that, as plaintiff's left ear was in fact diseased, in a condition dangerous and threatening to her health, the operation was necessary, and having been skillfully performed at a time when plaintiff had

requested a like operation on the other ear, the charge of assault and battery cannot be sustained; that in view of these conditions, and the claim that there was no negligence on the part of the defendant, and an entire absence of any evidence tending to show an evil intent, the court should say as a matter of law, that no assault and battery was committed, even though she did not consent to the operation. In other words, that the absence of a showing that defendant was actuated by a wrongful intent, or guilty of negligence, relieves the act of defendant from the charge of an assault and battery. We are unable to reach that conclusion, though the contention is not without merit. It would seem to follow from what has been said on the other features of the case that the act of defendant amounted at least to a technical assault and battery. If the operation was performed without plaintiff's consent, and the circumstances were not such as to justify its performance without, it was unlawful, and if it was wrongful it was unlawful. As remarked in 1 Jaggard on Torts, 437, every person has a right to complete immunity on his person from physical interference of others, except in so far as contact may be necessary under the general doctrine of privilege; and any unlawful or unauthorized touching of the person of another, except it be in the spirit of pleasantry, constitutes an assault and battery. In the case at bar, as we have already seen, the question whether defendant's act in performing the operation upon plaintiff was authorized was a question for the jury to determine. If it was unauthorized, then it was within what we have said, unlawful. It was a violent assault, not a mere pleasantry; and even though no negligence is shown it was wrongful and unlawful. The case is not like a criminal prosecution for assault and battery, for there an unlawful intent must be shown. But that rule does not apply to a civil action, to maintain which it is sufficient to show that the assault complained of was wrongful and unlawful or the result of negligence 1 Addison on Torts, 689; Lander v. Seaver, 32 Vt. 114, 76 Am Dec 156; Vosburg v. Putney, 80 Wis. 525, 50 N. W. 403, 14 L. R. A. 226. 27 Am St. Rep. 47.

The amount of plaintiff's recovery, if she is entitled to recover at all, must depend upon the character and extent of the injury inflicted upon her, in determining which the nature of the malady intended to be healed and the beneficial natue of the operation should be taken into consideration, as well as the good faith of the defendant.

Order affirmed.

POSSESSION OF X-RAY MACHINES—DEFENSE OF PHYSICIANS.

The Supreme Court of Oregon says that in the malpracitce case of Beadle vs. Paine, brought to recover for the alleged negligent treatment of a fractured arm, a physician was asked on his examination in

chief if there was not an x-ray machine in the city where the treatment was given, to which he answered that a certain physician had one. To push the inquiry on cross-examination to the extent of ascertaining whether it was usual in that locality for every surgeon to have a machine of the kind, or whether the one possessed by the physician referred to was the only one to be found in that locality, the court says, was not without the scope of reasonable inquiry. It was germane to the subject entered on by the plaintiff and altogether relevant. It is a good defense in an action for malpractice, where the physician or surgeon is charged with negligence or the non-observance of proper care or the want of skill in performing the services undertaken, the court says, that the patient was negligent at the time, which conduced or contributed to produce the injury complained of; but it will not suffice to defeat the action that the injured party was subsequently negligent, and thereby conduced to the aggravation of the injury primarily sustained at the hands of the physician or surgeon, and such conduct on the part of the patient is pertinent to be shown in mitigation of damages only where enhanced thereby, but not to relieve againts the primary liability. Of course, if the patient refused or failed to follow the directions given him, he could not complain, the court says, if his negligence in that respect conduced to the injury. That is to say, if it prevented or retarded union or healing of the parts, for the directions were a part of the treatment prescribed, and a want of observance of them on the patient's part would defeat the action. The want of ordinary prudence on the part of the patient would be tantamount to negligence, and, if it was a contributing cause to the injury, the case would be within the rule.—J. A. M. A.

RAILROAD COMPANY NOT LIABLE FOR NEGLIGENCE AT HOSPITAL.

The Court of Appeals of Kentucky says, in Illinois Central Railroad Company vs. Buchanan, that the latter party while in the service of the railroad company had his kneecap broken and was sent to the Illinois Central Hospital for treatment. He subsequently brought this action against the railroad company for damages, claiming that while under the care of the physicians and nurses of the hospital he was unskillfully and improperly treated. It was shown, however, that the Illinois Central Hospital Association, which conducted the hospital, was a separate and distinct corporation from the railroad company, although all officers and employes of the railroad company were made members of the corporation, with certain exceptions, and sums which the members were required to pay were collected by the railroad company to pay the expenses of the hospital, and went into the hands of the treasurer of the hospital association, who was also the treasurer of the railroad company. So the court says that the

proposition was presented that, because the railroad company simply acted as the agent in the gathering of the funds from its employes for the hospital purposes, it thereby made a contract to be responsible for the conduct of those in control of the hospital. The conclusion reached by the court is that the railroad company was in no way liable for the conduct of the directors of the hospital corporation, or the physicians or the attendants at the hospital. The court says that if the railroad company was the rael party at interest, and was simply using the hospital association for its financial profit, then the court might consider whether or not it was a case where it should look at the substance, and not the shadow, of things, in determining its liability. Doubtless the railroad company was indirectly benefited by its employes having proper and humane treatment at the hospital prepared for them, but that incidental benefit could not raise the question suggested, nor make it liable for the act of servant or agent of an independent corporation. —J. A. M. A

STATUS LYMPHATICUS DEATH DURING CHLOROFORM.

The Second Appellate Division of the Supreme Court of New York says that the trial judge told the jury in the malpractice case of Wood vs. Wyeth that in a civil case the evidence to establish negligence must be just as strong as that required to establish guilt in a prosecution for manslaughter. No discussion is necessary to show that such is not the law. It is conclusively settled by authority in the state of New York that in a civil case the plaintiff rests only under the burden of proving his case by a preponderance of evidence, and not beyond a reasonable doubt. The law required that the physician, on undertaking treatment of the patient, should possess that reasonable degree of learning and skill ordinarily belonging to a physician and surgeon in the locality in which he practiced, and imposed on him the duty to use reasonable care and diligence in the exercise of his skill and the application of his learning, and to act according to his best judgment. It was conceded on the trial that there was no question as to the physician's learning or skill, so that the only remaining questions were whether he used reasonable care and diligence in the exercise of his skill and the application of his learning to accomplish the purpose for which he was employed, and whether he acted according to his best judgment. If he did, he was not legally responsible for the death of the boy. According to the physician, he found the patient suffering from blood poinoning, which was in danger of becoming general. His temperature was more than 100 degrees, and he knew positively that blood poisoning was going to get into his system. He thereon resolved to operate on the boy that day, to try to save him from this general blood poisoning. He then questioned the patient as to whether he

had had any breakfast, and the boy responded that he had had a piece of meat and some bread. He used chloroform as an anesthetic instead of some other agent because he believed it was safe and better for the child, who presented such a bad appearance that the physician did not intrust anybody else to administer the chloroform, but gave it himself. Unfortunately, the chloroform proved fatal, because of a condition of the patient's system described as "status lymphaticus," not discoverable by any physical examination that could have been made before death. The theory of the plaintiff's counsel, as indicated by a question to the witness, was that the boy had eaten a breakfast consisting of a quarter of a pound of pork, a quarter of a pound of ham, four slices of bread, two eggs, and a cup of coffee, only three hours before the operation; but, if this were the fact, there was no evidence, the court says, that the physician was informed of it. The test here applicable to his conduct was not what the patient had actually done in the way of taking food, but what the patient told the physician on that subject. The case, instead of being one of negligence, appeared to be only another melancholy instance of a death on the operating table in a charity hospital of a patient being treated with a high degree of skill and care by a surgeon of unquestioned learning. Such a death is always painful enough to the conscientious surgeon under whose care it occurs but it can not subject him to any legal liability, where there is no sufficient proof that he was derelict in the performance of his professional duty toward his patient.

A CERTIFICATE INDISPENSABLE.

The Court of Criminal Appeals of Texas says, in the case of Stone vs. State, where the plaintiff had a diploma from an institution in another state, that it appeared from a reading of Section 8 of the act of the Twenty-seventh Legislature, although one may have a diploma "issued by a bona fide medical college of respectable standing," still he must receive a certificate to practice medicine from one of the duly constituted boards of medical examiners of the State of Texas, which shall be recorded, before he would be authorized to practice. The court takes it, however, that it would not be necessary for the plaintiff to be examined by said board, if he had complied with the other provisions of the statute, to wit, filed his diploma, with satisfactory evidence that his diploma was issued by a bona fide medical college of respectable standing, and certificate issued by the board and properly recorded, as required by the statute. But he did not secure a certificate. Whether he should be examined or not was immaterial, in the absence of the certificate. It was true, the statement of facts showed that the board refused to examine him or issue a certificate. This was a matter that might be reached through the civil courts. But the cer-

tificate was the sine qua non to his practicing medicine. Having received no certificate, he could not practice. As to whether the board arbitrarily refused to examine him, or not, was a matter with which this court had nothing to do. If the board arbitrarily refused him a certificate, it was no defense to a prosecution for practicing medicine, since he must have the certificate from a board of medical examiners before he could practice. The court would not be understood as holding that he had not complied with the requirements of the statute in order to secure his license, but does hold that he had not secured the certificate to practice, and this must be done before he could practice medicine. Again, it says that it does hold that the act is constitutional and that, if the boards of medical examiners had arbitrarily refused to give the plaintiff a certificate of license, still he must get such certificate from one of said boards before he could practice. Failing in this, he was subject to prosecution under the terms and conditions of the law. It was contended that the act was unconstitutional on account of giving preference to the allopathic, homeopathic and eclectic schools of medicine, to the exclusion of all other schools, but the court does not think it repugnant to the constitutional provision that "no preference shall ever be given by law to any schools of medicine."—J. A. M. A , July.

MORPHIN POISONING, PRESCRIPTIONS AND SUBSTITUTIONS.

Justice Gaynor, delivering the opinion of the Supreme Court of New York, Trial Term, Kings County, for the case of Laturen vs. Bolton Drug Co.. says that the charge in the complaint was negligence by the defendant's pharmacist in filling a prescription of one Dr. Cruikshank for the plaintiff, by which she was poisoned by an overdose of morphin or opium, as was claimed. The prescription was: "Elixir Pinus Comp. cum heroin—ounces 6—M—'s. One teaspoonful in water every four hours." The pharmacist saw that it only called for a patent medicine and less than an original bottle. From a pamphlet he had he also found that M. put up "Elixir Pinus Compositus" in the same bottle with the same name on the label, but with the additional two words, "with Heroin," the pamphlet giving a formula showing that the proportion of heroin was 1-24 of a grain to the dram. The pharmacist therefore, in order to filli the requrement of the words "cum Heroin" in the prescription, added 1-24 of a grain of Heroin to the dose to the "Elixir Pinus Compositus," of which he had a bottle in stock. Justice Gaynor holds that there was plainly no negligence in this. But it appeared that the "Elixir Pinus Compositus," according to the printed formula, consisted of nine separate drugs, one of which was "morphin acetate, 1-16 gr.," while the "Elixir Pinus Compositus, with Heroin," omitted the morphin acetate. However, conceding that it was a negligent oversight of the pharmacist to

add 1-24 grain of heroin to a dose containing 1-16 of a grain of morphin acetate. Justice Gaynor does not think that the plaintiff could have been poisoned by it. He says that it did not seem to him that there was any evidence on which the jury could be permitetd to find that the plaintiff was poisoned by an overdose of morphin, and he therefore dismissed the case. It was not for the jury to guess; the fact had to be proved. Moreover, he believes that a court may take judicial notice of the scientific fact that 1-10 of a grain of morphin taken every four hours could not have poisoned the plaintiff. He says, too, that it was very evident that the names on the two bottles were, taken together, very misleading, and for this reason the prescription was negligent. It should have unmistakably distinguished between the two bottles since the names on their labels did not. Finally, Justice Gaynor says: "My attention is called to the fact that the doctor has published in a medical journal and otherwise the false and invented statement that it was decided in this case that a pharmacist may change a doctor's prescription, or substitute some other medicine than that it calls for, without liability. I regret to feel obliged to say that he is so well known in our courts, where he has been for many years connected with litigations of unsavory character, to say the least, that no notice needs to be taken of his false statement so far as the legal profession is concerned, and I understand that to be so of the medcial profession also. But lest any drug clerk may be misled by such false statement to the danger of others, it seems proper that I say that not only was no such thing said or decided, but it was not presented or even mooted. Where would counsel be found to present and argue such an absurd proposition?"

PRIVILEGE NOT SEVERABLE.

The First Appellate Division of the Supreme Court of New York says that in the personal injury case of Powers vs. Metropolitan Street Railway Company the plaintiff called as a witness, for the purpose of proving the extent and nature of his injuries, the surgeon at the hospital to which he had been taken, who examined and treated him at that time. After the surgeon had been sworn, and before his direct examination was begun, the plaintiff's counsel stated that he called the witness for a special purpose, and asked that the cross-examination be limited to that purpose; but he did not state what that purpose was. The witness, in response to questions, then testified that he had charge of the plaintiff while in the hospital, and, on being handed a card, he stated that the memorandum on it was in his handwriting, was made at the time the plaintiff was in the hospital, and that it expressed his opinion at that time of the plaintiff's case; that it was a diagnosis of the case, and that, without reference to it, he could not, from memory, state the plaintiff's condition at the time. After examining the card,

apparently for the purpose only of refreshing his memory, he testified that the plaintiff had phlebitis, contusion and thrombosis of the saphenous veins, explaining the meaning of those terms. On cross-examnation he testified to being connected with the Vanderbilt Clinic where he had seen the plaintiff, examined and treated him. He was not allowed to testify as to plaintiff's condition while attending the Vanderbilt Clinic, the testimony being excluded as not proper on cross-examination. Afterward he was called as a witness for defendant; his testimony was then excluded as privileged, which the court holds was error.

By calling out the testimony which the plaintiff did from the physician as to his condition immediately after the accident for the purpose of showing the nature and extent of his injuries, the court says that the plaintiff waived the privilege granted him under Section 834 of the Code of Civil Procedure, and authorized the physician to disclose all the information acquired while in attendance on him professionally. Having once waived the privilege, and introduced the physicians' testimony as to his injuries, the plaintiff could not again claim the benefit of the privilege for the purpose of excluding other testimony by the same physician as to the development and progress of the same injuries at a subsequent date. Having opened the door to let in the testimony of his physician as to the injuries at one time, he could not again close it so as to exclude the testimony of the same physician which related to the progress and development of those injuries.

It appeared that this physician, at the time of the trial, was in attendance as an expert for the defendant, and, the court says, the plaintiff doubtless feared that his opinion might be biased by the fact, and his testimony might, therefore, be prejudicial to the plaintiff's cause of action; but, while that fact might have a bearing on the weight to be given to the testimony, it was not a ground for excluding it. The plaintiff saw fit to rely on the physician to testify as to the examination made immediately after the accident and the condition then existing. Having done this, he could not close the physician's lips as to a condition existing subsequent thereto, when the condition, according to his own claim, resulted from those injuries. The plaintiff could not sever his privilege so as to waive it in part and retain it in part. Having once waived it on the trial, it then ceased to exist, either partially or entirely, at least so far as the trial was concerned. —J. A. M. A.

LIABILITY OF TOWN FOR EMERGENCY ATTENDANCE ON PAUPER

The Supreme Court of Minnesota holds, in the case of Robbins vs. Town of Homer, that, where the town supervisors are required to provide for the care and support of the poor therein, and have no

regular physician to attend its paupers, and a pauper suffers from an accident which requires the immediate attention of a surgeon, who renders services to relieve the necessity, he may recover reasonable compensation from the town, although he had not been requested by the authorities to attend the patient. The court says that in chapter 172 of the Laws of Minnesota of 1899 it is prescribed that county physicians shall be appointed by the county commissioners to attend on the poor when necessary; and it was therein specifically provided that, in case of emergency, where any poor person had become a county charge, and should be suddenly injured or afflicted, and so require immediate treatment before the arrival of the proper county physician, any reputable or duly licensed surgeon who should prescribe for or treat such injured or afflicted person might receive compensation from the board, with added provisions for notice by the emergency physician Then follows a further proviso that this act shall not apply to counties caring for the poor by the township system. The view, however, is not to be tolerated, under well-settled constitutional limitations, that a class distinction in behalf of counties and to discriminate as to towns was created by this proviso. The most that can be said of this legislation relative to county physicians is that it is an indication of the policy of the state to provide for an apparent and reasonable requirement to protect the unfortunate poor where injury and sudden sickness may prevent the attendance of the regularly appointed physician whose duty is to look after the unfortunate charges of the state, and without any such statute the reason therefor is plain and apparent. The impulses of humanity, the dictates of natural justice, as well as the pecuniary interest of the municipal body on whom the duty is imposed, demand that, where the officials have charge of the poor are unable to act in a case of pressing urgency, the course indicated ought to be pursued, and should be justified, if it can be done on any reasonable legal grounds. The county or town must provide for the unfortunate pauper who has met with an accident requiring instant succor as soon as may be. To decline this mandate of humanity and duty wilfully by those on whom it is imposed would subject such officials to prosecution for misconduct in office. If the poor person in question in this instance had died, and the supervisors had been absent, the court has little doubt that a person providing for his burial would have a legal claim against the town; and, on the same reasons, why not a physician whose ministrations in a pressing emergency seek to avoid what may result in his death? The superivsors on whom the duty to secure the physician was imposed under legal as well as moral obligations had not provided for the same, and the court has no doubt that it should be held that the physician who immediately answered the call of emergency, perhaps to save life, or diminish the increase of expenditures against the public, would have a valid claim for compensation.

COMPENSATION OF PHYSICIANS AS EXPERT WITNESSES.

The Supreme Court of Nebraska holds, in the case of Main vs. Sherman County, that one testifying as an expert on a subject requiring special knowledge and skill, in the absence of a special contract, is entitled only to the statutory fee. This action was brought by a duly licensed physician who had been called by the prosecution and had testified as an expert witness in a prosecution for homicide in the district court of the defendant county, and had been paid the statutory witness fees. He claimed that he was entitled to additional compensation because his testimony was not that of an ordinary witness, but such as required special knowledge and skill. A demurrer filed to his petition was sustained. The Supreme Court Commissioners say that they are fully aware that the authorities are divided on this question, but think it hardly accurate to say that the authorities are nearly evenly balanced. On careful examination of the authorities it will be found that, after the elimination of the cases resting on peculiar constitutional or statutory provisions and on local customs, the decided weight of authority supports the conclusion reached in this case. The following are some of the cases sustaining this conclusion: Dixon vs. People, 168 Ill , 179; Flinn vs. Prairie County, 60 Ark., 204; Ex parte Dement, 53 Ala., 389; State vs. Teipner, 36 Minn., 535; Summers vs. State, 5 Tex. App., 365; Larimer County Comm. vs. Lee 3 Colo. App., 177. It has been held that the state may require the services of its citizens without compensation. Bennet vs. Kroth, 37 Kan., 235; West vs. State, 1 Wis., 209; Ex parte Chamberlain, 4 Cow., 49. Nor do the commissioners think the rule embodied in that conclusion so oppressive as it might appear at first glance. They say that the benefits of civil government of necessity carry with them certain duties more or less onerous to the citizen. It not unfrequently happens that the citizen is compelled to serve the state at a pecuniary loss. When an officer armed with a warrant commands the assstance of a citizen in making an arrest the latter, however valuable his tie, is not permitted to stand and bicker for fees; when called to serve as a juror, a citizen will not he heard to complain that the compensation fixed by law is inadequate. As to compensation in such matters, the scale is fixed without regard to calling or countenance, and the common laborer and the man of large affairs, rich and poor, learned and unlearned, are on equal footing. As was said in the Dement case, above cited: "The administration of justice being a source of mutual benefit to all the members of a community, each is under obligation to aid in furthering it as a matter of public duty, and every competent citizen may be summoned by due process of law to appear and render personal services in court without right on his part to a special compensation for so doing. His time is claimed by the public as a tax paid by him

to that system of law which protects his rights as well as those of others." For these reasons the Supreme Court affirms the judgment of the District Court in favor of the defendant county, holding as first above stated.—J. A. M. A.

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E. W. COOK, Secy. Citizens Trust Co.
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